



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

PETITION NO. 111 OF 2018

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010
IN THE MATTER OF: ARTICLES 2, 3, 10, 22, 23, 27, 28, 29, 41, 47, 48,
159, 162, 165, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010
IN THE MATTER OF: ENFORCEMENT OF THE CONSTITUTIONAL RIGHTS
AND FREEDOMS AS ENshrined UNDER ARTICLES 27, 28, 29, 41, 47
AND 48 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER: CONSTITUTIONAL PRINCIPLES OF FAIRNESS,
REASONABLES AND LEGITIMATE EXPECTATION

AND

IN THE MATTER OF: SECTION 5, 25, 27, 28, 45, 46 AND
87 OF THE EMPLOYMENT ACT 2007

BETWEEN

WAMBATI SIMIYU MERIT.....PETITIONER

-AND-

MUSIC COPYRIGHT SOCIETY OF KENYA.....RESPONDENT

JUDGMENT

Introduction

1. The Petitioner’s suit is contained in the Re-Amended Petition dated 16.3.2020 which seeks the following prayers:

- a. A Declaration that the Respondent has violated the Petitioner’s right to fair labour practices, right to fair administrative action under Articles 10, 27, 41 and 47 of the Constitution of Kenya.
- b. A declaration that the Petitioner’s contract of service has been unlawfully and illegally been terminated.
- c. General damages as shall be assessed by the Honourable Court for unlawful and unfair termination violation of the Petitioner’s constitutional rights, psychological anguish as well as extensive reputational injury visited upon the Petitioner by the Respondent.

d. An order be and is hereby made that Respondent to immediately pay the Petitioner Kshs. 50, 431,375 as pleaded in the Petition.

e. An order be and is hereby made that the Respondent remits the Petitioner's statutory deductions to the relevant bodies for the year 2017, 2018 and 2019.

f. An order be and is hereby made that the Respondent immediately remit the deducted but unremitted deductions being NSSF, NHIF, Sacco Deductions, PAYE, Family Bank and CFC Stanbic Bank loans all amounting to Kshs. 3,003, 942/-.

g. Costs and incidentals of the Petition.

h. Any other reliefs as this Honourable Court may deem fit.

2. The the petition is supported by the Affidavits sworn by the petitioner and it is opposed by the Respondent through Affidavits sworn by Milka Kulati, and Lazarus Muli.

3. The Petition proceeded by way of written submissions.

Petitioner's case

4. The Petitioner's case is that he employed by the Respondent as an Administration Manager on 26.9.2008 until 12.1.2017 when he was appointed the Chief Executive Officer under a 4 year contract; that on 14.5.2018, he received a letter dated 11.5.2018 sending him on compulsory leave for 60 days with effect from even date to allow investigations into accusations that had been levelled against him; and that before he could report back to work, he was issued with a letter dated 2.7.2018 which extended his suspension to 27.8.2018 because the investigations were not yet complete.

5. He further stated that vide a letter dated 2.7.2018, he was summoned by the Respondent where he was only questioned without any explanation why he had been summoned nor was he informed about the finding of the investigations against himself; that on 19.7.2018, he received a letter correcting the letter extending his suspension to read "Extension of Compulsory Leave"; that after the lapse of the compulsory leave, on 27.8.2019, he never received any communication with respect to the findings of the investigations or calling him to any disciplinary proceedings; and that till the date of filing the re-amended petition, he has never been directed to report to office, or served with a termination letter.

6. He averred that the Respondent arbitrarily has withheld his salaries from January 2018 to date and failed to remit statutory deductions owed to the Kenya Revenue Authority (KRA), National Hospital Insurance Fund (NHIF) and National Social Security Fund (NSSF). He further averred that he has tax arrears of Kshs. 1,137,939.99 as for that reason he cannot be issued with a tax compliance certificate for the years 2017 to 2020.

7. In his view the aforesaid Respondent's actions were malicious and tactically designed to violate his rights under Articles 27 (1),41, 45 and 47 of the Constitution, sections 5, 28,4 and 43 of the Employment Act and section 4 of the Fair Administrative Action Act.

Respondent's case

8. The Respondent confirmed that the Petitioner was sent on 60 days compulsory leave the for failing to submit the annual audited financial statements to the Kenya Copyright Board leading to the cancellation of the Respondent's licence to operate a Collective Management Organisation (CMO); failing to relay crucial information to the Directors; undermining the Directors; issuance of dishonored cheques; and negligently delaying to make payment to third party companies that were legitimately engaged by the Respondent.

9. The Respondent, in its further affidavit, contended that the audit commissioned in 2020 revealed that the Petitioner paid legal fees to himself though he was not an advocate and withdrew large sums of money without approval or supporting documents.

10. It contended that pursuant to Clause 4 (IX) of the contract of employment, the Petitioner was to ensure that the Respondent complied with all applicable regulations and as such he cannot rush to the court seeking to punish the Respondent for acts or omissions that were attributable to him.

11. It further contended that the investigations were never carried to completion after petitioner gave a proposal for amicable settlement by being paid his dues as result of which the disciplinary proceedings against him were abandoned. Accordingly, it computed and offered to resolve the dispute by paying the Petitioner a sum of Kshs. 4,553,253.90 by way of 24 equal monthly installments of Kshs. 89,718.90 but the petitioner declined the offer.

12. It further contended that by rejecting the offer, the Petitioner declined a request to allow the Respondent enter into negotiations with third parties such as KRA.

13. Finally, it contended that the non-remittance of statutory deductions is a problem affecting all employees of the Respondent and that it has entered into negotiations with KRA, NHIF and NSSF to settle the unremitted deductions. Consequently, it prayed for suit to be dismissed for being unmeritorious, misconceived and frivolous.

Parties' Rejoinder

14. The Petitioner contended that the accusations against him were not factual. He reiterated that the accusations were never explained to him and he was never subjected to any disciplinary proceedings to answer to the accusations.

15. He contended that the Respondent's offer was made while the matter was pending in Court and he rejected it because it was absurd, unfair and disproportionate to the misfortunes occasioned on him by the Respondent. He further contended that the non-remittance of his salaries and statutory deductions is illegal and unlawful.

Petitioner's submissions

16. The Petitioner argued that no notice was issued concerning the intended termination of the Petitioner's employment and at no point did the Respondent express its intention to terminate him.

17. He relied on section 43 and 45 of the Employment Act and argued that the Respondent failed to demonstrate the validity of the perceived reasons for his termination. He argued that it is apparent that he was never taken through the due process to determine the end of his contractual term.

18. He cited section 4 of the Employment Act to submit that he was never called for a disciplinary hearing and no reasons were given before his contract was whimsically terminated.

19. He relied on **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR and Omwoyo Makiya Hebson v Ojode Udoto & Onjor Adv [2016] eKLR** where the courts held that an employee must be taken through the mandatory process outlined under section 41 of the Employment Act.

20. He submitted that he was never notified of the outcome of the purported investigations and the Respondent proceeded to seemingly try him in absentia and convicted him. He submitted that the Employment Act contemplates an oral hearing before termination of the contract. In support of this, he relied on the finding in **David Wanjau Muhoro v Ol Pejeta Ranching Limited [2014] eKLR** and **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR**.

21. He further submitted that that written communication without an oral hearing is unfair procedure as held in **Kiliopa Omukuba Okutoyi v Telkom Kenya [2012] eKLR**.

22. He submitted that despite the respondent expressly sending him on compulsory leave for 94 days, it failed to reach out to him once investigations were completed. He argued that his indefinite compulsory leave was unlawful as it led to his termination.

23. He averred that the Respondent erred by purporting to deduct his leave days during the period of compulsory leave. He relied on the **David Wanjau Muhoro Case [Supra]** where the Court held that the law does not contemplate the conversion of an employee's annual leave entitlement into anything other than money.

24. He argued that the withholding of his salaries and allowances was in contravention of the Employment Act and the employment contract which was still in force. He relied on **Thomas Sila Nzivo v Bamburi Cement Limited [2014] eKLR** where the court held that withholding an employee's salary cannot be disciplinary sanction.

25. He submitted that he is entitled to the unpaid and undisputed dues and that the issues affecting the Respondent's employees should not be visited upon him, its former employee.

26. Finally he submitted that his fundamental rights under Article 41, and 47 of the constitution were violated by the respondent through the unfair termination, withholding salary and allowances, and through conversion of compulsory leave into normal annual leave. Consequently, he prayed for the reliefs sought in the Re-amended petition.

Respondent's submissions

27. The Respondent argued that the claim for unpaid salaries has been presented as if it was salary that was withheld for work done under the contract. It submitted that the contract had been frustrated by the failure to secure licence to collect and administer royalties under section 46 of the Copyright Act. It relied on **Kenya Airways Limited v Satwant Singh Flora [2013] eKLR** where the Court held that the failure to obtain a work permit was an intervening event which vitiated the contract between the parties.

28. It further submitted that the Petitioner was unable to pay his own salary or that of other employees for the period 2017-2019 because he failed to submit the preceding audited financial statements.

29. It admitted that the Petitioner's suspension was extended indefinitely and before he could be summoned by the new board in November, 2019 he intimated to the Chairman that he intended to resign. Consequently according to the respondent there was no need to subject the Petitioner to a disciplinary hearing. However, the petitioner filed the instant case and declined its offer to amicably resolve the dispute.

30. Finally, it submitted that the Petitioner's contract of employment was neither unfairly terminated nor were his rights under Articles 10, 27, 4 and 47 of the Constitution and sections 20, 41 and 42 of the Employment Act breached, and as such he is not entitled to the reliefs sought.

Issues for determination

31. The undisputed facts are that the Petitioner was employed by the Respondent as its CEO; that he was initially sent on 60 days compulsory leave from 11.5.2018 which was extended for a further 34 days from 11.7.2018; that after the lapse of the said compulsory leave, the Petitioner was never allowed back to office until he brought this suit in March 2020; and that the respondent appointed Milkah Kaluti to the position of the CEO and thereby terminating the petitioners employment contract.

32. It is now trite law in Kenya that for termination of an employee's contract of service to pass the test of fairness, it must be grounded on a valid and fair reason, and it must be done in accordance with a fair procedure. The parties did not agree on the issue for determination and therefore I have framed the same as follows:

- a. Whether the termination was justified by a valid reason.
- b. Whether the procedure followed was fair.
- c. Whether the petitioner's rights under Article 41 and 47 of the constitution were breached.
- d. Whether the Claimant is entitled to the reliefs sought.

Whether the termination was justified by a valid reason.

33. The Petitioner was sent on compulsory leave for 94 days to allow investigations into various allegations levelled against him but thereafter he was never taken to any disciplinary process or called back to work. The respondent contended that it abandoned the process after the petitioner proposed for amicable settlement before the investigations were completed. However, no written evidence was adduced to prove the alleged proposal and as such the court finds that the respondent terminated the petitioner's employment contract before establishing the validity of the allegations which led to sending the petitioner to compulsory leave.

34. Under section 43 and 45 of the Employment Act, the employer has the burden of proving that the reason for terminating the contract of employment was valid and fair. In this case the respondent stated the reasons leading to sending of the petitioner to compulsory leave pending investigation but then abandoned the process to pursue the alleged amicable settlement. It follows that the respondent has not proved on a balance of probability, the reasons justifying the termination of the petitioner's employment contract.

Whether fair procedure was followed.

35. The respondent admitted that it abandoned the disciplinary process after the petitioner proposed to resolve the matter amicably. However, without any evidence of such proposal for amicable settlement, the only reasonable inference to draw is that petitioner's contract was impliedly terminated without being accorded a hearing. The said termination can be implied from the prolonged compulsory leave without pay and also from the appointment of another person, one Milka Kaluti, to the position of the CEO.

36. Section 41 of the Employment Act provides:

“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

37. The foregoing position was affirmed by the Supreme Court in **Kenfreight (E.A) Limited v. Benson K. Nguti[2019]eKLR** when it held that:

“Had the appellant complied with the requirements of section 41 and 45 of the Employment Act, the summary dismissal would have been a fair one. But to the extent that the appellant did not follow the statutory procedure the dismissal was found to be unfair, which we agree.”

38. Having found that the Respondent herein did not accord the Claimant a fair hearing before terminating the petitioner's contract, as required under section 41 and 45 (2)(c) of the Employment Act, I proceed to hold that the termination was not done in accordance with a fair procedure.

Whether the petitioner's rights under Article 41 and 47 were breached.

39. The petitioner contended that his right to fair labour practices under Article 41 of the Constitution was violated through the indefinite compulsory leave without pay, and by having the compulsory leave deducted from his annual leave days. He further contended that his right to fair administrative action under Article 47 of the Constitution was breached through termination of his contract of employment without being accorded a fair hearing.

40. The respondent admitted that the claimant was sent on compulsory leave and his salary was not paid. It contended that the failure to pay

salary affected all the staff because the claimant failed to secure licence to collect loyalties and that denied income to it. Accordingly, it contended that the petitioner's contract was frustrated by factors beyond its ability. The petitioner denied the said accusation and maintained that the action by the respondent was unjustified.

41. I agree with the petitioner that the prolonged compulsory leave was unjustified and the matters were made worse by the failure to pay his salary and by the indication that the said leave would be deducted from his annual leave. The said conduct obviously violated the petitioner's right to fair labour practices as envisaged under Article 41 of the constitution.

42. Likewise, the failure to explain the reason for the termination of the petitioner's contract of employment and the failure to accord him a fair hearing as contemplated under section 4 of the Fair Administrative Actions Act and Section 41 of the Employment Act violated his right to fair administrative action as envisaged under Article 47 of the Constitution.

Whether the Petitioner is entitled to the reliefs sought

43. Having found that the respondent has not proved a valid reason for terminating the petitioner's employment, and that a fair procedure was followed, I make declaration that the termination was unfair and unlawful within the meaning of section 45 of the Employment Act. The petitioner had worked for the respondent for over ten years and still had a legitimate expectation to work for one year before expiry of his contract in January 2021 but as at 18.2.2020 he had been replaced by another person. There is no prove that he contributed to the termination through misconduct. In the circumstances, I find that the Petitioner is entitled to 6 months' gross salary as compensation for the unfair termination.

44. In addition the claim for 3 months' salary in lieu of notice is granted because clause 2 of his contract of employment provided for a notice period of 3 months before the termination. In this case the termination was done without any prior written notice. Someone just filed an Affidavit sworn on 18.2.2020 introducing herself as the respondent's CEO before the petitioner's contract of employment had lapsed.

45. The petitioner claimed his unpaid salary from January 2018 to January 2021 including the period he was on compulsory leave. The respondent admitted that it has not paid all its employees their salary and blamed the petitioner for situation. I have already made a finding of fact that the termination of the petitioner's employment was confirmed by the new CEO vide his Affidavit sworn on 18.2.2020. Consequently, he is only entitled to the unpaid salary plus the relevant allowances for the period running from January 2018 to January 2020 equaling to 36 months because he was on employment and could not look for alternative employment. However, the Petitioner is not entitled to extraneous allowance, car allowance, entertainment allowance and telephone allowance as provided under clause 7 of the contract of employment during the period of the compulsory leave since they were only intended to facilitate actual performance of duty which was not done during the said leave period.

46. The claim for 75 leave days outstanding as at 18.5.2018 is allowed based on the basic salary. Although the respondent indicated that the compulsory leave days were to be treated as part of his normal leave days, such suggestion has no legal basis because a compulsory leave is just a form of suspension at the discretion of the employer. Such suspension cannot amount to normal leave which is given on the basis of a voluntary request by the employee. An employer cannot force his employee to go on his annual leave if he does not want. All what the employer can do is to bar the employee from accumulating leave days.

47. In respect of gratuity, the Petitioner is entitled to the gratuity at the rate of 20% of his basic salary pursuant to Clause 7 (ii) of the contract of employment. The contract was breached by the respondent after the petitioners completed 3 years. Consequently, he is entitled gratuity of 20% of the basic pay for that period of 3 years including time he was on compulsory leave.

48. With respect to the general damages sought, I am of the view that violation of constitutional right to fair labour practices and fair administrative action under Articles 41 (a) and 47 (1) and (2) of the Constitution, has adequately been compensated above under section 49 (1) of the Employment Act.

49. The claim for medical cover fails because the petitioner did not prove that he fell sick during the period employment and the employer failed to meet the medical expense. The computation of the said benefit is therefor without any basis in law or his contract.

50. The claim for performance based bonus also fails because clause 7 (iv) provided that the payment of this bonus was dependent on the achievement of the Board approved targets. The Petitioner did not indicate any of the set targets or prove that he achieved any target set for him. In any case it is obvious from the record that the respondent performed dismally and that is why it was unable to pay salaries.

51. With respect to the statutory deductions, the Respondent is liable to remit all the deductions made from the petitioner's salary to KRA, NSSF and NHIF for the period he was employed. In addition, the respondent is liable to remit or refund all the money deducted from the petitioner's salary towards his financial obligations to his Sacco, Family Bank and CFC Stanbic Bank.

Conclusion and disposition

52. I have found that the petitioner's contract of service was unfairly terminated by the respondent before the due time. I have further found that the petitioner is entitled to some of the reliefs sought. Consequently, I enter judgment for him in the following terms:

Notice	Kshs.2, 227,500
Compensation	Kshs.4, 455,000
Unpaid salary Jan-May 2018	Kshs.3, 712,500

Unpaid salary June 2018- Jan 2020	Kshs.11, 700,000
Leave	Kshs. 1,298,076.92
Gratuity	Kshs. 270,000
Total	<u>Kshs. 23,663,098.92</u>

53. The Petitioner is awarded costs of the suit plus interest at court rates but the judgment sum is subject to statutory deductions. The respondent is directed to forthwith remit or refund all the deductions made from the petitioner's salary but not remitted to KRA, NSSF, NHIF, his SACCO, Family Bank and CFC Stanbic Bank.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE