



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 152 OF 2020**

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS**

**UNDER ARTICLES 22(1) AND (3) AND 258(1) OF THE CONSTITUTION OF KENYA (2010)**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL**

**FREEDOMS UNDER ARTICLES 19, 20, 21, 22, 23, 24, 25 (1), 27, 28, 29, 31, 41,**

**47(1) & (2), 48 AND 50(1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 45 OF THE EMPLOYMENT ACT**

**CHAPTER 226 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF SECTION 3 AND 12 OF THE EMPLOYMENT AND**

**LABOUR RELATIONS COURT (PROCEDURE) RULES, 2016**

**AND**

**IN THE MATTER OF SECTION 7 OF THE EMPLOYMENT AND**

**LABOUR RELATIONS COURT (PROCEDURE) RULES, 2016**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS**

**AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURAL RULES, 2013**

**BETWEEN**

**SIMON ONGATI KOMBO.....PETITIONER**

**AND**

**SBM BANK (KENYA) LIMITED.....1<sup>ST</sup> RESPONDENT**

**JUDGMENT**

1. The suit was commenced by way of a petition on 6<sup>th</sup> March, 2020 in which the petitioner prays for the following reliefs: -

- (a) **A DECLARATION** be and is hereby issued that the acts and letters of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents complained of above are and were unlawful and infringed upon the petitioner's rights and fundamental freedoms and are null and void **ab initio**.
- (b) **A DECLARATION** be and is hereby issued that the proceedings of the alleged staff Disciplinary Committee meetings purportedly held on 10<sup>th</sup> July, 2019 were illegal, null and void.
- (c) **A DECLARATION** be and is hereby issued that the letter of summary dismissal dated 22<sup>nd</sup> July, 2019 is unlawful, null and void.
- (d) **GENERAL DAMAGES** for providing unreasonable working environment, practicing unfair labour practices, and humiliating, demeaning and embarrassing the petitioner at the work place.
- (e) **COMPENSATION** equivalent to twelve (12) months consolidated salary for unlawfully and unfairly terminating Petitioner's employment.
- (f) Payment of a sum of Kshs 207,000.00 being the consolidated salary for the month of July, 2019.
- (g) Payment of one month's salary (Kshs 207,000.00) in lieu of notice.
- (h) Issuance of Certificate of Service.
- (i) Costs of the petition.

2. *The petition is premised on facts that may be summarized as follows:-*

- (a) The petitioner was employed by the 1<sup>st</sup> respondent in the position of a **Team Leader – Contact Centre, Grade Assistant Manager** by a letter dated 28<sup>th</sup> January, 2019 effective from 1<sup>st</sup> February, 2019. The petitioner was placed on six (6) months' probation in terms of Clause 80 of the letter. During the Probationary period either party was to give two (2) weeks written notice of termination of employment.
- (b) The clause also provided for evaluation of performance of the petitioner by his immediate supervisor and a performance evaluation report was to be submitted to the Human Resource Department. The evaluation was to be based on the individual performance including conduct and any other disciplinary matters.
- (c) The petitioner was paid Kshs 207,000 monthly salary and a telephone allowance of Kshs 3,000,00.
- (d) The Petitioner states that the 2<sup>nd</sup> respondent Pauline Macharia was his immediate supervisor being the manager in charge of Contact Centre in Nairobi.
- (e) The petitioner alleges that contrary to petitioner's legitimate expectations to work in a conducive and reasonable working conditions, the petitioner was subjected to extreme humiliation and embarrassment and/or unfair labour practices resulting to unfavourable working conditions as particularized below:-
  - (a) *On 14<sup>th</sup> March, 2019 and with intent to intimidate, annoy, insult, degrade, embarrass, demean, humiliate, disparage, injure, ridicule and/or scandalize the 2<sup>nd</sup> Respondent and while in the presence of the 1<sup>st</sup> Respondent's other staff members and all and sundry, rudely and loudly informed the petitioner, that it would do everybody good if he (the petitioner) "invested in deodorant and mouth wash."*
  - (b) *The words uttered by the 2<sup>nd</sup> Respondent as aforesaid were uttered in bad faith and with ill motives of intimidating, degrading, demeaning, humiliating and embarrassing the Petitioner in front of other staff members.*
  - (c) *In addition to the foregoing, on or about the 3<sup>rd</sup> week of March, 2019, while having a meeting with the 2<sup>nd</sup> Respondent, she un-warrantingly and sarcastically asked the petitioner not dare record their conversation.*
  - (d) *The expressions above meant that the said 2<sup>nd</sup> Defendant so suspected and mistrusted the petitioner making it hard for her to be objective as the petitioner's immediate boss.*
  - (e) *Further, the petitioner states that contrary to expectation, the 1<sup>st</sup> Respondent intentionally and willfully refused, failed and/or neglected to induct the petitioner to his roles or even hand over leaving him to wonder about the assigned duties.*

3. The petitioner states that as a result of the aforesaid toxic working environment, extreme humiliation, insubordination and/or unreasonable working conditions, the petitioner suffered psychological, emotional and mental depression arising from work-related stress.
4. The Petitioner states that he was forced to get medical assistance from Nairobi and Agakhan hospitals to stabilize him. Doctors attending to him advised him to take rests. Following the medical advice, the petitioner sought and was granted by the 1<sup>st</sup> respondent sick off/leave from time to time.
5. That despite the foregoing, the petitioner states that when his Performance Evaluation Report became due, the 2<sup>nd</sup> Respondent being petitioner's supervisor refused to prepare and/or submit any such reports to the Human Resource Department as expected thus jeopardizing the petitioner's employment.
6. That during a period when the petitioner was away on bed rests treating depression and stress that arose from his employment conditions, a show cause letter dated 27<sup>th</sup> May, 2019 was sent to his work official email address accusing the petitioner of sending to bank customers incorrect bank account details and absconding duty.
7. The petitioner responded to the notice by a letter dated 4<sup>th</sup> June, 2019, answering all the issues.
8. That despite the response, the 1<sup>st</sup> respondent summarily terminated the petitioner's employment contract by a letter dated 22<sup>nd</sup> July, 2019.
9. In the letter, the 1<sup>st</sup> Respondent stated that a staff Disciplinary Committee meeting was held on 10<sup>th</sup> July, 2019 which the petitioner failed to attend and a decision was taken in the absence of the petitioner.
10. The petitioner states the summary dismissal was unlawful, and unfair and that the 1<sup>st</sup> and 2<sup>nd</sup> respondent violated his statutory and constitutional rights and fundamental freedoms including Article 28 which guarantees every person an inherent dignity and the right to have that dignity respected and protected; Article 31, which provides for right to privacy of individual, including protection from unwanted intrusion to personal space; Article 41, which guarantees all persons the right to fair labour practices including the right of the employee to work in reasonable working conditions; Article 47(1) and which confers the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
11. Furthermore, the petitioner states that the respondent violated Section 35, 36, 41, 43, 45 and 51 of the Employment Act, 2007 as set out in the petition.
12. The facts are buttressed in a supporting affidavit of the petitioner sworn to on 19<sup>th</sup> February, 2020, to which various documents are attached including the contract of employment; email correspondence between the petitioner and Mr. Simon Maina of Human Resource Employee and Industrial Relations department of the 1<sup>st</sup> Respondent; the show cause letter dated 4<sup>th</sup> June, 2019 and the letter of summary dismissal dated 22<sup>nd</sup> July, 2019 which states that the petitioner was found guilty of providing erroneous accounts details to customer and absconding duty. The petitioner prays to be awarded as prayed in the petition.

### **Replying Affidavit**

13. The 1<sup>st</sup> respondent filed a replying affidavit sworn to by Simon Muriithi Maina on 1<sup>st</sup> September, 2020 to which various documentation in defence of the suit is attached.
14. The deponent states that he is the Employee and Industrial Relations Senior Manager of the 1<sup>st</sup> Respondent. The deponent admits the fact of employment of the petitioner vide letter dated 28/1/2019 and that he commenced work on 1/2/2019 and was placed under the Direct Supervision of the 2<sup>nd</sup> Respondent who works for the Respondent as the Vice person and Head of Customer Experience.
15. That the petitioner was governed by the 1<sup>st</sup> Respondent's Human Resource Policies, Code of Ethics and Business conducts, policy manuals and Instruction Circulars periodically in force as well as the provisions of the letter of appointment.
16. That the petitioner was taken through the boarding process which included orientation and induction. The petitioner signed attendance register of all the on board sessions on 21/2/2019, 7/3/2019, 12/3/2019; 20/3/2019, 21/3/2019 and 30/3/2019.
17. Subsequently, the petitioner was issued with his job description dated January, 2019 and the petitioner was soon after taken through the said job description and both he and 2<sup>nd</sup> Respondent executed the Job Description on 14/3/2019.
18. That the petitioner at the beginning of his employment was therefore properly inducted and properly informed of his duties, was properly executing his duties and was commended from time to time on his work; was accorded any and all assistance whenever he sought for it; and was treated with utmost respect and was valued as a key member of staff of the 1<sup>st</sup> respondent.
19. That despite the above, in the month of May, 2019, the petitioner started exhibiting tiredness and a complete change of attitude in regard to his work.
20. That on 3/5/2019, the 2<sup>nd</sup> respondent sent the petitioner an email requesting him to prepare his evaluation form (Balance Score Card) for the purpose of his evaluation and performance review in line with Clause 8 of his letter of offer. That the petitioner neglected to do so despite the fact that he was aware that it was his duty to fill in the said evaluation form and arrange for the review of his performance with

his direct supervisor on time before the due date of his probation. The email dated 3/5/2019 is attached to the affidavit.

21. That in addition, the email dated 3/5/2019 invited the petitioner for a meeting on 9/5/2019 to evaluate his performance based on the evaluation form that he was required to prepare. The petitioner did not only fail to fill the evaluation form but he did not attend the meeting.

22. The 2<sup>nd</sup> respondent had several conversations with the petitioner over the matter. However, the petitioner's behavior did not change which resulted in the matter being escalated to the Human Resource Department.

23. That on 14/5/2019 and 16/5/2019, a formal meeting was held with the petitioner at the Human Resource Department in a bid to understand the change in behavior and to establish ways in which he could be assisted. Copies of the minutes of the two meetings marked 5(a) and 5(b) are attached.

24. In the meetings, the petitioner acknowledged that he had not been reporting to work as he should and promised to change and to take his work seriously. This was followed up by his written commitment to do the same dated 17/5/2019 attached to the affidavit.

25. That during the pendency of the petitioner's employment he fell ill on numerous occasions and the deponent has provided sick notes set out under paragraph 14 of the affidavit in a table.

26. That the various sick offs granted to the petitioner were recorded in the Employment records as days he was rightfully absent as a result of the recommendations made by his medical practitioners. That the petitioner did not at any time inform the 1<sup>st</sup> respondent or Human Resource Department the particular reasons the sick offs were recommended. That the alleged depression was never brought to the attention of the Human Resource department. That in addition on 21/5/2019 the petitioner requested for an off day due to an emergency he had encountered. Further on 23/5/2019, the petitioner communicated to the 1<sup>st</sup> respondent that he would not be reporting to work for two additional days at which point the 1<sup>st</sup> respondent obliged to both requests as the petitioner had said that his father was ill. The emails by the petitioner dated 21/5/2019 and 23/5/2019 are attached to the affidavit.

27. Despite the foregoing, the petitioner was absent from work without due reason and/or explanation for 32 days set out at paragraph 18 of the replying affidavit.

28. Furthermore, on 14/5/2019 the deponent was informed that on 16/4/2019, the petitioner had sent wrong Bank Account details to customers which directly opened the 1<sup>st</sup> Respondent to reputation issues and queries. Emails regarding the incident marked 9(a) and (9(b) dated 14/5/2019 are attached.

29. The matter of absenteeism and sending wrong bank Account details to customers were escalated to Human Resource Department and the petitioner was issued with a show cause letter dated 27/5/2019 by the deponent and 1<sup>st</sup> Respondent's Vice person and Head of Human Resources, Ms Jackie Ogonji. The said show cause letter was sent via the petitioner's personal email as well as his assigned work email on 29/5/2020. The emails are attached. This was the normal channel, the 1<sup>st</sup> respondent communicated to the petitioner.

30. The petitioner however continued to absent himself from his designated work place and on 31/5/2019 he responded to the show cause letter through his personal email acknowledging receipt of the same and that he would resume work on 3/6/2019 and respond to the show cause letter then.

31. On 3/6/2019, the petitioner did not report to work as promised and he responded to the show cause letter on 4/6/2019.

32. The Human Resource Department found the explanation by the petitioner to be unsatisfactory and a disciplinary committee was constituted to deal with the matter.

33. The petitioner was served with a letter dated 11/6/2019 to attend the disciplinary hearing on 19/6/2019 at 2.p.m.

34. The letter is attached. The same was sent vide the personal email of the petitioner by the deponent.

35. That on 11/6/2019, the deponent called the petitioner on his personal phone to confirm that he had received the notice. The telephone conversation record is also produced.

36. On 18/6/2019, the deponent called the petitioner to confirm that he would attend the disciplinary hearing on 19/6/2019, but his calls went unanswered. The deponent wrote an email to the petitioner to follow up on the matter of attendance, but the petitioner did not respond. The email dated 18/6/2019 is attached.

37. The petitioner did not attend the disciplinary hearing on 19/6/2019 and another disciplinary hearing was scheduled for 3/7/2019 vide a letter dated 24/6/2019. The hearing was further rescheduled for 10/7/2019 due to unforeseen circumstances but the petitioner did not attend the hearing despite the fact that the notices were sent vide his personal email.

38. On 10/7/2019, the disciplinary process took place in the absence of the petitioner and by a letter dated 22/7/2019, the petitioner was summarily dismissed on the grounds of gross misconduct and contravention of the provisions of Section 17 of the Bank's Human Resource policy and Section 44(4) of the Employment Act, 2007. The letter was sent to the petitioner's last known address. The petitioner was informed of his right of Appeal and did not appeal to date.

39. That at no point did the 1<sup>st</sup> respondent receive any complaint from the petitioner that he was humiliated by the 2<sup>nd</sup> respondent. That the petitioner was a valued employee and was treated well. That at the time of the summary dismissal, the petitioner was still on probation which period was to end on 31/7/2019.

40. The petitioner has to date not collected salary due to him for days worked and payment in lieu of leave days not taken and has not collected his Certificate of Service.

41. That the petition lacks merit and it be dismissed with costs.

42. The petitioner filed supplementary affidavit in which he joined issue with matters raised in the replying affidavit and reiterated his averments in the petition and in the supporting affidavit.

43. The petitioner insisted that his rights and fundamental freedoms were violated by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and that he is entitled to the reliefs sought in the petition.

#### Determination

44. The parties filed written submissions and list of authorities which the Court has duly considered alongside all the depositions and documents filed in this petition.

45. The issues for determination are:-

(i) Whether the petitioner was unlawfully and unfairly summarily dismissed from employment?

(ii) Whether the petitioner's human rights and fundamental freedoms set out in the petition were violated by the respondent.

(iii) What remedies, if at all, is the petitioner entitled to.

46. In answer to the issue (i) above, it is beyond peradventure that the petitioner was employed by the 1<sup>st</sup> respondent by letter dated 28/1/2019 and the employment took effect on 1/2/2019. In terms of the said letter of employment, at clause 8, the petitioner was placed on 6 months' probation and confirmation of employment was subject to successful evaluation of performance during the probationary period.

47. It is without a doubt that the petitioner was summarily dismissed on 22/7/2019 for gross misconduct. The summary dismissal was during the probationary period which was due to end on 31/7/2019.

48. The Court is satisfied that the petitioner did not subject himself to an evaluation process as was required under clause 8 of the employment contract.

49. The Court is also satisfied that the petitioner absented himself from work for a total of 32 days without permission and/or explanation given by him to the 1<sup>st</sup> respondent.

50. The Court is also satisfied that the petitioner had communicated wrong account details to a customer.

51. The petitioner was served with a notice to show cause to which he responded.

52. The petitioner was severally invited to a disciplinary hearing to which he failed to attend without explanation.

53. On the facts placed before Court, the 1<sup>st</sup> respondent has discharged its onus under Sections 43, 44 and 45 in that it has established it had valid reasons to summarily dismiss the petitioner from employment. Furthermore, despite the fact that the petitioner was under probation at the time of summary dismissal and in terms of Section 42(1) of the Employment Act, 2007 which reads:-

*“The provisions of Section 41 shall not apply where a termination of employment terminates a probationary contract”* ,

54. The 1<sup>st</sup> respondent went ahead to accord the petitioner opportunity to answer to the charges in writing and to be heard verbally in his own defence at a disciplinary hearing in full compliance with the provisions of Section 41 of the Act, and Rules of natural justice.

55. Within the meaning of Clause 8 of the letter of employment of the petitioner, the petitioner's employment could only continue provided the petitioner was of good conduct, which condition the petitioner did not also satisfy.

56. The 1<sup>st</sup> respondent had also complied with the provisions of Section 42(2) which requires an employer not to place an employee on probation for a period exceeding six months in the first instance.

57. On the authority of the Court of Appeal decision in the case of **Nation Media Group Limited –s- Onesmus Kilonzo [2017] eKLR and Dismass Jelango and Another –vs- Amicable Travel Services Limited [2014] eKLR** the 1<sup>st</sup> respondent was within its right to terminate the employment of the petitioner for no reasons assigned provided the petitioner was given two weeks' notice.

58. However, on the facts of this case, the petitioner made it impossible for the 1<sup>st</sup> respondent to adhere to the probationary clause without subjecting the petitioner to a disciplinary process.

59. The Court finds that the summary dismissal of the petitioner was both lawful and fair.

60. With regard to issue (ii) above, the onus of proving violation of human rights and fundamental freedoms by the 2<sup>nd</sup> Respondent lies on the petitioner in terms of Sections 107 and 108 of the Evidence Act, Cap. 80 Laws of Kenya. Furthermore, the provisions of Section 41, 43 and 45 of the Employment Act 2007 are not applicable to an employee whose employment is terminated during the probationary period.

61. In this regard, the petitioner did not demonstrate to the Court that he at any one time complained and or protested to the Human Resources Department of the 1<sup>st</sup> Respondent orally or in writing that the 2<sup>nd</sup> respondent had abused, humiliated and mistreated him in the manner described in the petition or at all. Production of any such evidence would have demonstrated the unpalatable working conditions the petitioner was subjected to by his Lady Supervisor. The petitioner would have even obtained affidavit evidence from any other employee who witnessed the incidents alluded to, to demonstrate that indeed such abuse occurred at all.

62. To the contrary, the 1<sup>st</sup> respondent vide the replying affidavit has successfully discharged evidential burden placed on the defendant to rebut allegations of threatened and or actual violation of human rights and fundamental freedoms by another person.

63. Accordingly, the petitioner has failed to discharge the burden placed on him to prove that any of his human rights and fundamental freedoms was threatened and or violated by the 2<sup>nd</sup> and 1<sup>st</sup> Respondents. This claim must therefore also fail.

64. The petitioner having been summarily dismissed in terms of Section 44 of the Employment Act, and during the probationary period is not entitled and is not awarded any salary in lieu of notice.

65. The 1<sup>st</sup> respondent informed Court that the petitioner did not avail himself to collect his final dues that included salary for days not taken and collection of a Certificate of Service. The Court does not have to issue any orders therefore in this respect.

66. The petitioner should simply avail himself to collect his final dues and the Certificate of Service.

67. Accordingly the petition is wholly devoid of merits and is dismissed with no order as to costs having taken all the circumstances of the case into account.

**Dated and delivered at Nairobi (virtually) this 16<sup>th</sup> day of September, 2021.**

**Mathews N. Nduma**

**Judge**

Appearances

Mr. K. Mutai for Petitioner

M/s Nduku for 1<sup>st</sup> and 2<sup>nd</sup> Respondent

Ekale – Court clerk