



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO E081 OF 2020**

**IN THE MATTER OF ARTICLES 2(1),2(4),10(2)(b), 19(2), 20(1)(2)(3) & (4), 22(1),  
23(1) & (3), 27, 28, 29(d) & (f) AND 41(1) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF RULES 3, 10, 11, AND 22 OF THE CONSTITUTION OF KENYA  
(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND**

**PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF SECTIONS 5(3)(b), 5(5), 5(7), 9(2), 10(2) (h) & (k),  
10(5) & (7) OF THE EMPLOYMENT ACT NO 11 OF 2007**

**AND**

**IN THE MATTER OF SECTION 12 OF THE EMPLOYMENT  
AND LABOUR RELATIONS COURT ACT NO 20 OF 2011**

**AND**

**IN THE MATTER OF RULE 7(1) OF THE EMPLOYMENT AND  
LABOUR RELATIONS COURT (PROCEDURE) RULES, 2016**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL  
RIGHTS AND FREEDOMS UNDER ARTICLES 28 AND 41(1) OF THE  
CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**FRANCIS NDWIGAH NYAGA.....PETITIONER**

**AND**

**TRANSCHEM PHARMACEUTICALS LIMITED.....RESPONDENT**

## JUDGMENT

### **Introduction**

1. By a letter dated 1<sup>st</sup> February 2007, the Petitioner was employed by the Respondent in the position of Pharmaceutical Technologist. He earned an initial monthly salary of Kshs. 60,000 which was progressively increased over the period of employment.
2. In the course of time, the Respondent used the Petitioner's licence to register its premises for purposes of Pharmaceutical Technologist's Practice.

### **The Petition**

3. The Petitioner states that from 2008 and for the next two years up to 2010, the Respondent increased his salary by a consistent Kshs. 20,000 each year.
4. The Petitioner asserts that there was an oral agreement implied from the facts and conduct of the parties that an annual increment of Kshs. 20,000 would apply to the Petitioner's salary for as long as he was the Respondent's Branch Manager and his licence was being used to renew the registration certificate of the premises.
5. In December 2012, the Respondent's founder Managing Director, Dr. Gituku died and his wife, Lydiah Muthoni Wahome took over as the Managing Director.
6. The Petitioner states that he notified Ms. Wahome of his expected annual salary increment of Kshs. 20,000 in 2013, which was duly effected. In 2014, the Petitioner's salary was increased by Kshs. 4,000.
7. The Petitioner further states that from April 2017 until March 2018, the Respondent unilaterally deducted Kshs. 2,000 from his monthly salary purportedly because some drugs had expired.
8. The Petitioner avers that in September 2019, the Respondent placed a notice on the Notice Board at the Branch stating that one Moses Maingi Gichuru had been appointed as the Branch Manager in place of the Petitioner.
9. Later in December 2019, the Petitioner was informed that his licence would no longer be used to procure the registration certificate for the Branch premises. On 1<sup>st</sup> February 2020, the Petitioner received a letter dated 1<sup>st</sup> January 2020 confirming this position and notifying him that his salary would be reduced by Kshs. 15,000 on that basis.
10. It is the Petitioner's case that the Respondent altered the terms of his employment agreement without adhering to the law, which action amounts to an unfair labour practice and discrimination.
11. The Petitioner accuses the Respondent of violating the Constitution and cites the following instances:
  - a) To the extent that the Respondent unilaterally altered the Petitioner's contract by deducting Kshs. 15,000 from his basic salary, the Petitioner's right to fair labour practices enshrined under Article 41(1) of the Constitution was violated;
  - b) To the extent that the Respondent deducted Kshs. 2,000 from the Petitioner's salary between April 2017 and March 2018, the Petitioner's right to fair labour practices enshrined under Article 41(1) of the Constitution was violated;
  - c) To the extent that the Respondent altered the Petitioner's contract by failing and/or refusing to increase the Petitioner's salary by Kshs. 20,000 from the year 2014 to 2019, when the Petitioner was Branch Manager and his licence was being used to renew the Respondent's registration certificate, the Petitioner's legitimate expectation and the right to fair labour practices enshrined under Article 41(1) of the Constitution was violated;
  - d) To the extent that the Respondent discriminated against the Petitioner by failing to pay for the use of his practicing licence to renew the registration certificate of the Branch premises, while paying the other Pharmaceutical Technologists, the Petitioner's freedom from discrimination enshrined under Article 27 of the Constitution was violated;
  - e) To the extent that the Respondent altered the Petitioner's contract by demoting him from his position as Manager, the Petitioner's right to fair labour practices enshrined under Article 41(1) of the Constitution was violated;
  - f) To the extent that the Respondent demoted the Petitioner by placing a notice on the Notice Board and replacing him with his immediate Deputy, without informing the Petitioner what his role would be, the Petitioner's human dignity and the right to have that dignity respected and protected enshrined under Article 28 of the Constitution was violated;
  - g) To the extent that the Respondent deducted Kshs. 2,000 from the Petitioner's salary between April 2017 and March 2018, the Petitioner's right to fair labour practices enshrined under Article 41(1) of the Constitution was violated;
  - h) To the extent that the Respondent's Managing Director humiliated the Petitioner by chasing him from her office in the presence of junior staff, when he was discharging his duty as Manager of the Respondent's Development House Branch, the Petitioner's human

dignity and the right to have that dignity respected and protected as enshrined under Article 28 of the Constitution was violated;

i) To the extent that the Respondent altered the Petitioner's employment contract by denying him use of the Respondent's vehicle in 2018, the Petitioner's right to fair labour practices enshrined under Article 41(1) of the Constitution was violated;

j) To the extent that the Respondent, through the Managing Director, Lydiah Wahome has subjected the Petitioner to embarrassing and humiliating acts as a result of which his health condition has worsened, the Petitioner's right not to be tortured psychologically or subjected to cruel, inhuman or degrading treatment enshrined under Article 29(d) of the Constitution was violated.

12. The Petitioner therefore seeks the following remedies:

a) A declaration that the reduction of Kshs. 15,000 and Kshs. 2,000 from his salary, failure to increase his salary by Kshs. 20,000 between 2013 and 2019, demotion from the position of Manager and withdrawal of the company vehicle constitute alteration of the Petitioner's contract of employment;

b) A declaration that his replacement by his Deputy by way of a notice and his being chased from the Managing Director's office constitute violation of the Petitioner's human dignity and the right to have that dignity respected and protected;

c) An order directing the Respondent to reimburse the Petitioner the unpaid salary increment of Kshs. 20,000 per year from 2013 to 2019 computed at Kshs. 4,752,000;

d) An order directing the Respondent to adjust the Petitioner's salary to Kshs. 272,000 per month with effect from January 2020;

e) In the alternative to (c) and (d) an order directing the Respondent to reimburse the Petitioner the unpaid Kshs. 15,000 monthly fees for procurement of the annual licence from March 2007 to December 2019 computed at Kshs. 2,295,000;

f) An order directing the Respondent to refund the Kshs. 15,000 deducted from January 2020 until the date of compliance;

g) An order directing the Respondent to reimburse to the Petitioner Kshs. 24,000 unlawfully deducted from his salary in denominations of Kshs. 2,000 for 12 months between April 2017 and March 2018;

h) An order for compensation for violation of the Petitioner's constitutional rights;

i) Costs of the Petition.

### **The Response**

13. The Respondent's response to the Petition is by way of a Replying Affidavit sworn by its Managing Director, Lydiah Muthoni Wahome.

14. Wahome depones as follows:

a) That the Petitioner was appointed by the Respondent as a Pharmaceutical Technologist;

b) That there was no agreement, implied or otherwise, between the Petitioner and the Respondent that the Petitioner would receive an annual increment of Kshs. 20,000;

c) That the Respondent was entitled to appoint a substantive Manager at its Branch;

d) That the deduction of Kshs. 15,000 and Kshs. 2,000 from the Petitioner's salary was reasonable and lawful;

e) That the Petitioner was not entitled to a company vehicle and the rendering of the same was on a need basis depending on the duties assigned to him on a day to day basis.

### **Findings and Determination**

15. From the parties' pleadings and submissions, I have drawn the following issues for determination in this Petition:

a) Whether there was variation of the Petitioner's terms of employment;

b) Whether the Petitioner has proved a case of discrimination;

c) Whether the Petitioner's rights to fair labour practices and human dignity were violated.

d) Whether the surcharge imposed against the Petitioner was lawful and fair;

## Variation of Employment Terms?

16. The first complaint by the Petitioner under this head is that by ceasing to increase his salary by Kshs. 20,000 per annum, the Respondent had unilaterally altered his terms of employment. In this regard, the Petitioner contends that because his salary had been increased by Kshs. 20,000 over a period of time, then this practice had crystallised into a term of employment, which the Respondent was obligated to observe during the Petitioner's employment.

17. Regarding the Petitioner's annual salary increments, the undisputed fact is that the Petitioner received an annual salary increment of Kshs. 20,000 from 2008 up to 2010 and in 2013.

18. The Petitioner states that he forfeited the salary increment for the years 2011 and 2012 because the Respondent had fully funded his training at the Kenya Institute of Management (KIM). He therefore received a salary increment of Kshs. 12,000 in 2011, which placed his monthly salary at Kshs. 132,000.

19. The Court did not see any evidence to support the averment that the Respondent had funded the Petitioner's education at KIM or that the Petitioner had agreed to forfeit his full annual increment.

20. The question for determination is whether the periodic salary increment given to the Petitioner had acquired the character of an implied term of employment, which could not be varied without the Petitioner's consent.

21. The *Halsbury's Laws of England (4<sup>th</sup> Edition)* at paragraph at page 778 addresses the issue of an implied term as follows:

***"In addition to the terms which the parties have expressly adopted, there may be other terms imported into the contract, these latter being generally known as 'implied' terms....as a general rule, the courts will enforce not only the terms expressly agreed by the parties but also those which are to be logically implied from those express terms including from any recitals....The question of whether a term is to be logically implied from the express terms of the agreement is a matter of construing the intention of the parties."***

22. The Respondent made reference to the persuasive decision in *Marks and Spencer PLC v BNP Paribas Securities Trust Co. (Jersey) Ltd [2016] UK SC 72* where Lord Neuberger rendered himself thus:

***"In most, possibly all disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term."***

23. In dealing with the subject of the intention of parties in contract formation, Lord Steyn in *G. Percy Trentham Ltd v Archital Luxfer Ltd [1993] Lloyds Rep 25* stated the following:

***"It seems to me that four matters are of importance. The first is that the law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpected reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men...that means the yardstick is the reasonable expectation of sensible businessmen."***

24. The Petitioner relied on the decision in *Maxwell Miyawa & 7 others v Judicial Service Commission [2017] eKLR* where it was held that remuneration is an essential term of a valid employment contract, which cannot be varied without consultation.

25. Ordinarily, salary increment is not a term of employment except where salary progression is set out in the letter of appointment. The Petitioner was employed by the Respondent vide letter of appointment dated 1<sup>st</sup> February 2007. This letter did not set out any salary progression and no document was produced to support the Petitioner's claim that he was entitled to a fixed annual salary increment.

26. The only conclusion to make therefore, is that the salary increment implemented in favour of the Petitioner did not qualify as a term of his employment and failure to pay a salary increment in any year could not be said to be a variation of his contract of employment.

27. The other complaint under this head is that by appointing a Branch Manager for the Development House Branch, the Respondent had demoted the Petitioner. The Petitioner claims to have been appointed to this position sometime in March 2007. There was however no letter of appointment.

28. From the record, the Petitioner's employment was by way of a formal letter of appointment. It would appear therefore that the parties had established a practice of documenting the employment relationship. That being the case, appointment to any other position, other than the entry position of Pharmaceutical Technologist would have been formalised by letter. In the absence of any such letter, the Petitioner's claim of having been appointed to and later removed from the position of Branch Manager cannot stand.

29. Regarding the withdrawal of the motor vehicle used by the Petitioner, the only thing to say is that there was no evidence that the said motor vehicle had been assigned as a benefit as opposed to a tool of work.

30. On the claim that the Respondent had reduced the Petitioner's salary by Kshs. 15,000 there is documentary evidence on record that the said amount was an allowance paid to the Petitioner during the time his practicing licence was used to renew the licence of the Respondent's

premises. This allowance was stopped from the time the Petitioner's licence was no longer required and the Court finds no fault in this arrangement.

31. In his written submissions, the Petitioner suggests that because the Respondent is the custodian of employment records, the burden of proof regarding the foregoing issues shift to the Respondent. With respect, this proposition is a misapplication of Section 10(7) of the Employment Act.

32. In its decision in *Casmir Nyankuru Nyaberi v Mwakikar Agencies Limited [2016] eKLR* this Court stated the following:

***“This Court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the Claimant from the burden of proving their case. Even where an employment contract is oral in nature, the Claimant must still adduce some evidence whether documentary or viva voce to corroborate their word. More importantly, where an employee believes that the employer has in its possession some documents that would support the case of the employee, that employee is obligated to serve a production notice.”***

33. The Petitioner himself opted not testify before the Court and having taken this route, he cannot shift the responsibility of proving his case to the Respondent.

34. On the whole, the Court did not find any evidence of variation of the Petitioner's terms of employment.

### **Discrimination?**

35. The Petitioner accuses the Respondent of discriminating against him contrary to Article 27 of the Constitution and Section 5 of the Employment Act.

36. On this limb, the Petitioner alleges that the Respondent treated him differently from other employees of similar cadre. He claims that he was not paid an allowance of Kshs. 15,000 for use of his licence.

37. There is however evidence on record that this amount was in fact reduced from the Petitioner's salary from the date the Respondent stopped using the Petitioner's licence. Without any evidence to the contrary, the logical conclusion is that the said amount was paid to the Petitioner for the period his licence was being used. This would explain why the Petitioner did not lay a claim on this account until the allowance was withdrawn.

38. There is therefore no basis for the claim of discrimination which consequently fails.

### **Fair Labour Practices and Human Dignity**

39. The Petitioner pleads that his right to fair labour practices protected under Article 41 of the Constitution has been infringed. He further accuses the Respondent of embarrassing and humiliating him to his juniors at the work place, hence infringing on the Petitioner's right to human dignity under Article 28 of the Constitution.

40. The Petitioner makes general statements regarding what he considers to be violation of his rights to fair labour practices and human dignity. The issues around fair labour practices have been addressed in the foregoing parts of this judgment. Regarding the statements on issues of human dignity I have this to say; none of them were pleaded or proved in accordance with the precision standard set by *Anarita Karimi Njeru v Republic [1979] KLR 54*.

### **The Surcharge**

41. The final issue for determination in this Petition arises from the surcharge of Kshs. 24,000 levied against the Petitioner, on account of expired drugs. All the Respondent states is that the surcharge was justified.

42. In its decision in *Kenya National Library Services v Beatrice N. Ayoti [2014] eKLR* this Court held that a surcharge, being a disciplinary action, can only be undertaken within the confines of the procedural fairness requirements set out in law.

43. In this case, the Respondent made no attempt to comply with these requirements and the surcharge was therefore unlawful and unfair. The Petitioner is therefore entitled to a refund of the surcharge amount.

### **Final Orders**

44. In the upshot, the Petitioner's claims for payment of unpaid salary increment, adjustment of salary, monthly fees for procurement of annual licence, refund of Kshs. 15,000 deducted from salary and compensation for violation of constitutional rights are disallowed.

45. The claim for Kshs. 24,000 being money recovered from the Petitioner's salary as surcharge succeeds and is allowed.

46. I therefore enter judgment in favour of the Petitioner in the sum of **Kshs. 24,000** being the amount of an unlawful surcharge.

47. This amount will attract interest at court rates from the date of judgment until payment in full.

48. As the Petition succeeds only in part, I direct that each party will bear their own costs.

49. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 23<sup>RD</sup> DAY OF NOVEMBER 2021**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Ong'ato for the Petitioner

Mr. Machina for the Respondent