



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**PETITION NO. 1 OF 2019**

**IN THE MATTER OF A PETITION UNDER ARTICLES 22 AND 23 OF THE CONSTITUTION.**

**AND**

**IN THE MATTER OF INFRINGEMENT OF FUNDAMENTAL FREEDOMS AND RIGHTS OF THE PETITIONER UNDER ARTICLES 27(1)(2)(4) & (5) OF THE CONSTITUTION OF KENYA.**

**AND**

**IN THE MATTER OF INFRIGMENT OF FUNDAMENTAL FREEDOMS AND RIGHTS OF THE PETITIONER UNDER SRTICLES 41(1)(2)(A) OF THE CONSTITUTION OF KENYA.**

**BETWEEN**

**HENRY SIMIYU WANYONYI.....PETITIONER**

**VERSUS**

**UNGA HOLDINGS LIMITED.....1<sup>ST</sup> RESPONDENT**

**MANPOWER NETWORK LIMITED.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner instituted this suit vide the Petition dated 14<sup>th</sup> January 2019 seeking the following prayers:

- a) A declaration that the petitioner’s fundamental rights and freedoms under Article 27(1)(2) and 41(1)(2)(a) of the Constitution of Kenya have been and were grossly violated by the Respondents.
- b) That general damages, exemplary damages and aggravated damages under Article 23(3) of the Constitution of Kenya, for the unconstitutional conduct of the Respondents, be awarded to the Petitioner.
- c) Declaration be made to the effect that the Petitioners termination was unlawful and unjustified as the same was not within the ambits of the Employment Act and other employment laws.
- d) The petitioner be awarded 12 months’ compensation for unlawful and unjustified termination as provided for under section 49(c) of the Employment Act of Kshs. 164,584.32.
- e) The Respondent to pay the Petitioner one-month salary in lieu of Notice of Kshs. 13,715.36.
- f) The Court order for payment of all claims emanating from underpayments that remain unpaid for the periods of time the

**Petitioner worked for the Respondent of Kshs 48,245.76**

**g) The Respondent to pay the petitioner all dues for his annual leave that was not taken for the years worked amounting to Kshs. 22,155/-**

**h) The Respondent to pay the Petitioner severance pay calculated at the rate of 15 days' pay for every year worked of Kshs. 12,937.50**

**i) Cost of this Petition be awarded to the Petitioner**

**j) Any further Orders, writs, directions as this Honourable Court may consider be granted to the Petitioner.**

2. The Petitioner's case is that the 2<sup>nd</sup> Respondent recruited him to work for the 1<sup>st</sup> Respondent, whereas the 2<sup>nd</sup> Respondent received the petitioner salary and transmitted the same to him as well as pay statutory deduction on his behalf.

3. It is stated that the Petitioner was engaged by the 1<sup>st</sup> Respondent on the 31<sup>st</sup> August, 2016 as a loader earning daily wages of Kshs 450 which was paid on weekly basis that would translate to Kshs 10,700 per month. That his earning was the same till his termination on 31<sup>st</sup> August, 2018.

4. That prior to his termination, the Petitioner on 25<sup>th</sup> August, 2016 suddenly and without prior medical condition lost his sight. That the 1<sup>st</sup> Respondent informed the petitioner's wife about the said situation who picked him from work. Subsequently he sought for medical treatment in various hospital in the bid of seeking for cheaper options.

5. The Petitioner then lost his employment on the premise that he was no longer suitable to work for the 1<sup>st</sup> Respondent having lost his sight.

6. The Petitioner felt he was discriminated upon by the Respondents on the basis of his health and disability when he had worked diligently for the 1<sup>st</sup> Respondent before he lost his eye sight.

7. He stated that he was never paid house allowance, was underpayment, was never allowed to take leave and was not issued with certificate of service upon termination.

8. In response to the Petition, the 1<sup>st</sup> Respondent denied ever employing the Petitioner rather that they had sourced manpower from the 2<sup>nd</sup> Respondent and they duly remunerated the 2<sup>nd</sup> Respondent who was an independent labour service provider. Therefore, that the petitioner was the 2<sup>nd</sup> Respondent employee and not theirs.

9. The 1<sup>st</sup> Respondent averred that it is not privy to the terms of contract between the Petitioner and the 2<sup>nd</sup> Respondent and that they never at any point terminated the service of the said Petitioner.

10. It is also stated that there are no constitutional issues that have been raised by the Petitioner to warrant the issuance of the Orders sought.

11. The 2<sup>nd</sup> Respondent also filed a response to the Petition on the 1<sup>st</sup> August, 2019 which was regularized on the 16<sup>th</sup> December, 2019, the first one having been filed out of time without leave of Court. The 2<sup>nd</sup> Respondent contended that the Petition is incompetent and bad in law as the issue of termination does not meet the threshold of a constitutional petition.

12. It is stated that the 2<sup>nd</sup> Respondent is engaged in business of providing and managing qualified and suitable staff for the 1<sup>st</sup> Respondent by outsourcing, recruiting and training employees to meet requirement of the 1<sup>st</sup> Respondent.

13. That the 2<sup>nd</sup> Respondent was contracted by the 1<sup>st</sup> Respondent to provide casual laborers to perform the duties of loaders and the petitioner was one of the casual employees taken up by the 1<sup>st</sup> Respondent.

14. The terms of employment was that the petitioner would work in a group of 10 people with a team leader who was the contact person, and was approached by either of the Respondents whenever there was work to be done at the 1<sup>st</sup> Respondent. That the petitioner and the entire team was only contracted depending on availability of work.

15. It is stated that the petitioner throughout his employment with the Respondent had eye problems and could occasionally go for check up at the Nakuru Provincial General Hospital, but his eye problem did not interfere with his work.

16. It is stated that the week beginning on 27<sup>th</sup> August, 2018 to 2<sup>nd</sup> August, 2018 the Petitioner did not report to work and neither did he give any explanation and the week beginning 3<sup>rd</sup> to 9<sup>th</sup> September, 2019 he reported to work one day only and worked half a day and left employment without Notice, never to return.

17. The 2<sup>nd</sup> Respondent through its agent, one Carolyn Chepkorir Momanyi inquired on the petitioner whereabouts only to be informed that the petitioner had been admitted at Sabatia Hospital over the eye issue.

18. That while the Petitioner was in hospital the welfare committee and his colleagues contributed towards his medical bill. The Respondent then awaited the petitioner's recuperation and to their dismay they were served with this Petition without any information as to the health state of the petitioner or a demand letter of the alleged unfair termination.

19. That the Petitioner left the employ of the Respondent without any notice or permission and was never fired or at all and therefore the claim herein is misconceived and ought to be dismissed.

20. The Petition was canvassed by way of written submissions with the Petitioner filing on the 15<sup>th</sup> September, 2021, the 1<sup>st</sup> Respondent on the 6<sup>th</sup> October, 2021 and the 2<sup>nd</sup> Respondent filed on the 12<sup>th</sup> October, 2021.

#### **Petitioner submissions.**

21. It was submitted for the petitioner that as much as the petitioner was employed as a casual employee by the 1<sup>st</sup> Respondent having been sourced by the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent employed him on continuous basis for about 2 years before he was fired therefore was no longer a casual as defined under section 2 of the Employment Act but an employee as envisaged under section 37(1) of the Employment Act and therefore the procedure required for termination under section 35(1)(c) came to play and the Petitioner ought to have been given notice just like any other employee. the Petitioner supported their argument by citing the case of **Nyamawi Gambo V Mombasa Maize Millers Limited and another [2016] eKLR** and the case of **Kenya County Ag Government Workers Union V County Government of Nyeri & Another [2015] eKLR**.

22. Accordingly, it was submitted that the terms of engagement converted to term contract since the Petitioner worked continuously for about 2 years with the Respondent.

23. On whether the Petitioner was unfairly terminated, it was submitted that, having established that the Petitioner was the Respondents' employee, the Respondents were mandated under section 41 of the Employment Act to follow due procedure in firing him even on account of ill health. In this they cited the case of **AMM V Spin Knit Limited [2013] eKLR**.

24. It was argued that, the Respondents were therefore mandated under the employment Act to follow due process of termination and thus their failure to follow the laid down process of termination under section 41 amounted to unfair termination.

25. The Petitioner urged this Court to allow his Petition as prayed.

#### **1<sup>st</sup> Respondent's Submissions.**

26. The Respondent herein submitted from the onset that the Petition as filed does not meet the threshold of an Employment Petition as the issues raised herein are purely employment and not violation of an employee rights. Also that the Petitioner has not demonstrated with precision how the said Articles of the Constitution have been violated.

27. It was further submitted that the Petitioner was not their employee and at no point was there any employer-employee relationship between the Petitioner and the 1<sup>st</sup> Respondent, therefore there is no cause of action as against the 1<sup>st</sup> Respondent. In this they cited the case of **Nick Githinji Ndichu V Kiambu County Assembly and Another [2014] eKLR**.

28. It was then argued that, the 1<sup>st</sup> Respondent sourced for man power from the 2<sup>nd</sup> Respondent and the 1<sup>st</sup> Respondent would pay the 2<sup>nd</sup> Respondent who could in turn pay its employee therefore the Petitioner having been outsourced from the 2<sup>nd</sup> Respondent was the 2<sup>nd</sup> Respondent employee and not their employee. The Respondent herein supported their argument by citing the case of **Christine Adot Lopeiyo V Wycliffe Mwathi Pere [2013] eKLR** where the Court held that; -

“In most cited authorities in this regard from various jurisdictions, several tests have been applied to distinguish between what comprise ‘employment’ as against what constitutes ‘service’ in case of contracts of service as contrasted with contracts for service. They include the following:

a) The control test whereby a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work.

b) The integration test in which the worker is subjected to the rules and procedures of the employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business.

c) The test of economic or business reality which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit.

d) Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time. That a contract of service entails service in return for wages, and, secondly, mutual promises for future performance. The arrangement creates a sense of stability between the parties. The challenge is that where there is absence of mutual promises for stable future performance, the worker thereby ceases to be classified as an employee as may be the case for casual workers.

These tests are however not to be seen exclusively by themselves as they only serve as a guide based on the facts of each case. They are however a good guide to the issues as in this case.”

29. Accordingly, it was submitted that the Petitioner's relationship with the 1<sup>st</sup> Respondent did not meet any of the test in the above cited case therefore there was no employment between the Petitioner and the 1<sup>st</sup> Respondent and they urged this Court to dismiss the Petitioner as against the 1<sup>st</sup> Respondent with costs.

## **2<sup>nd</sup> Respondent's Submissions.**

30. The respondent herein submitted that it indeed hired the petitioner in December, 2017 as evidenced by the Records produced before court and not on 31<sup>st</sup> August, 2016 as alleged by the Petitioner. It was argued that the alleged employment date of 31<sup>st</sup> August, 2016 is without basis neither has it been backed with any evidence as provided for under section 107 and 108 of the evidence Act.

31. The Respondent further submitted that, the Petitioner worked for the 1<sup>st</sup> Respondent till 27<sup>th</sup> August, 2018 when he absconded duty only to report on the week starting on 3<sup>rd</sup> to 9<sup>th</sup> September, 2018 and worked for half a day and left employment without notifying his employer neither did he come back thereafter. It was then argued that the Petitioner was not fired as alleged rather that he left employment and never went back despite the follow up carried out by the 2<sup>nd</sup> Respondent agent one Ms. Carolyne Chepkorir Momanyi.

32. On whether his rights under Article 27 of the Constitution on discrimination was violated, it was submitted that the Petitioner was never discriminated in any way, in any case that the Petitioner has failed to plead with precision how he was discriminated by the Respondents.

33. The Respondent then took issue with the Petitioner choice of filing a petition in this case and not a normal claim and submitted that the Petitioner's claim is on an alleged unfair termination that should have been brought in a normal claim and not a petition. In this they cited the case of **Francis Atonya Ayeka V Kenya Police Service & Another [2017] eKLR**. Where the Court held that;-

“a litigant should not avoid the provisions of the Employment Act regarding unfair termination or wrongful dismissal by going behind the statute and seeking to rely directly on Article 41 of the Constitution on the right to fair labour practices. The purpose of the Constitution is that the right to fair labour practices is given effect in various statutes of which the Employment Act and the Labour Relations Act are primary.

The primary legislation should not be circumvented by seeking to rely directly on a constitutional provision. Both the Employment Act and the Labour Relations Act give effect to constitutional rights.”

34. Finally, it was submitted that the Petitioner left the Respondents' employment without any permission and was not fired as alleged therefore, the Respondent urged this Court to find for them against the Petitioner and proceed to strike out the Petition with costs.

35. I have examined the evidence and submissions of the parties herein. The issues for this court's determination are as follows;

1. Who between the 1<sup>st</sup> & 2<sup>nd</sup> respondent was the petitioners employer?
2. Whether the petitioner's employment was terminated unfairly and unjustly?
3. Whether the petitioner's constitutional rights were infringed by the respondents?
4. Whether the petitioner is entitled to the remedies sought?

### **1. Employment**

36. The petitioner herein submitted that he was employed by 1<sup>st</sup> & 2<sup>nd</sup> respondents. He indicated that the 2<sup>nd</sup> respondent hired him to work for the 1<sup>st</sup> respondent. He contends that he worked at the 1<sup>st</sup> respondent's premises daily earning 450/= per day.

37. The petitioners produced his NSSF statement as Appendix HSW 2 which shows that his employer was Manpower Networks Ltd. Indeed Manpower Network Ltd sent his NSSF remittances to NSSF.

38. The 1<sup>st</sup> respondent denied being an employee of the petitioner and submitted that they contacted the 2<sup>nd</sup> respondent to supply labour for them and duly paid the 2<sup>nd</sup> respondent.

39. Having considered these submissions, it is clear that the 2<sup>nd</sup> respondent is the one who managed the petitioner. The 2<sup>nd</sup> respondent is one who paid the petitioner and even deducted and remitted his NSSF dues to NSSF. The conduct of the 2<sup>nd</sup> respondent of hiring, deploying and paying the petitioner is an indication of the fact that the 2<sup>nd</sup> respondent retained the position of the employer and didn't relinquish it to the 1<sup>st</sup> respondent though deploying the petitioner to the 1<sup>st</sup> respondent's premises.

40. In the **COA Civil Appeal No.67 of 2015 (Kisumu) Abyssima Iron & Steel Ltd VS Kenya Engineering Workers Union & Jokali Handling Services Ltd the JJA** in determining this appeal found that some of the workers had been outsourced to the respondents but some remained employees of the appellants.

41. The outsourced employees were now under Jokali who were responsible for their remuneration, insurance, provision of protective clothing & equipment, payment of NSSF, NHIF contribution amongst other obligations. Jokali was also responsible for supervising these

employees and thus they remained employees of Jokali.

42. This appears the scenario herein where the 2<sup>nd</sup> respondent though supplying labour to the 1<sup>st</sup> respondent remain largely the employer of the petitioner and were responsible for his day to day work and even paid him and deducted and remitted all his statutory dues.

43. I find that the petitioner was therefore an employee of the 2<sup>nd</sup> respondent.

## **2. Termination**

44. As to the petitioner's termination, he has told court that he went blind when at work. 1<sup>st</sup> respondent informed his wife to come for him. He was treated in various hospitals and thereafter went totally blind. He was then terminated.

45. The petitioner has not informed court how he was terminated. The respondents aver that when the petitioner was unwell and treatment and they were awaiting for him to get well before decided the next cause of action when they were served with this petition.

46. From the evidence herein the petitioner got sick on 28<sup>th</sup> August 2018 when he lost his sight. The petitioner counsel informed the respondents of what had befallen the petitioner and wrote the petitioner a demand notice dated 16//12/2018 following the termination of the petitioner. There is no indication that the respondent replied to this demand. The petitioner thereafter filed this petition on 7/3/2019.

47. The contention by the respondent that they waited for the petitioner to get well before deciding the next cause of action is therefore not true.

48. The petitioner having worked for the 2<sup>nd</sup> respondent from 2008 as per the NSSF statement he became their permanent employee and could not be terminated without following due process.

49. However it is evident that he was constructively terminated by the respondents who stopped paying his salary on account of his sickness. It is therefore my finding that the petitioner was unfairly and unjustly terminated by the 2<sup>nd</sup> respondent.

## **3. Petitioner's rights**

50. The petitioner was unfairly and unjustly terminated by the 2<sup>nd</sup> respondent as found in (2) above. The reason for the termination was his inability to work due to blindness.

51. This in my view was a direct and blatant disregard to the petitioner's right of employment and non-discrimination due to disability. The petitioner submitted that his right vide Article 27 & 41 of the constitution were infringed upon. Article 27 of the constitution provides as follows:-

27. **Equality and freedom from discrimination**  
(1) **Every person is equal before the law and has the right to equal protection and equal benefit of the law.**  
(2) **Equality includes the full and equal enjoyment of all rights and fundamental freedoms.**  
(3) **Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.**  
(4) **The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.**  
(5) **A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).**  
(6) **To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.**  
(7) **Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.**  
(8) **In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.**

52. Indeed the petitioner having been terminated because he was blind is a direct infringement of his rights vide Article 27 (4) above on account of disability.

53. Article 41 of the constitution on the other hand emphasis observation of labour rights as follows;

## **41. Labour Relations**

- (1) **Every person has the right to fair labour practices.**  
(2) **Every worker has the right—**  
(a) **to fair remuneration;**  
(b) **to reasonable working conditions;**  
(c) **to form, join or participate in the activities and programmes of a trade union; and**

(d) to go on strike.

(3) Every employer has the right—  
(a) to form and join an employers organisation; and  
(b) to participate in the activities and programmes of an employers organisation.

(4) Every trade union and every employers' organisation has the right—  
(a) to determine its own administration, programmes and activities;  
(b) to organise; and  
(c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining.

54. The petitioner having been terminated without due process. I find that his rights to fair labour practices were infringed upon.

#### 4. REMEDIES

55. Having found that the petitioner's rights under the constitution were infringed upon and that he was unfairly dismissed and also treated in a discriminatory manner, I find that he entitled to the following remedies to be paid by the 2<sup>nd</sup> respondent;-

1. 2million as damages for compensation for breach of his constitutional rights.

2. 10 months salary as compensation for unfair and unjustified termination

= 10 x 13,713.36

= 137,154/=

3. 1 month's salary in lieu of notice

= 13,715/=

4. Unpaid leave not taken as pleaded

= 22.155/=

TOTAL = 2,173,024/=

Less statutory deduction

5. The 2<sup>nd</sup> respondent to pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

**DATED AND DELIVERED IN OPEN COURT THIS 23RD DAY OF NOVEMBER, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Odwa for 1<sup>st</sup> Respondent – present

Waiganjo for 2<sup>nd</sup> respondent – present

S. K. Mburu for Petitioner – present

Court Assistant - Fred