



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 128 OF 2018

ANTHONY KIBANDI WATUKU.....PETITIONER

VERSUS

INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION...RESPONDENT

JUDGMENT

1. The Petition was filed on 3rd December, 2018 by the petitioner seeking the following reliefs:-

- (a) A Declaration that the Petitioner's fundamental rights under Articles 26, 28, 40, 41, 43 and 47 of the Constitution of Kenya, 2010 have been and continues to be infringed by the Respondent.
- (b) Special damages of a cumulative sum of Kshs 10,003.929.90 as itemized at paragraph 125 of the Petition;
- (c) General damages for gross violation of fundamental rights;
- (d) Interest on (b) at Court rates from the date of filing suit until payment in full;
- (e) Interest on (c) at Court rates from the date of judgment until payment in full;
- (f) Costs of the suit and interest thereon at Court rates;**
- (g) Any other appropriate relief that the Honourable Court shall deem fit to grant to protect the Petitioner's fundamental rights.**

2. The petitioner was employed by the respondent on 27th May, 2006 as a Senior ICT Officer and was granted a letter of appointment accordingly in which the terms and conditions of employment were stated.

3. In addition the petitioner was subject to staff Code of Regulations. The petitioner was in corporate scale Grade 6 earning a basic monthly salary of Kshs.70,400. The petitioner was in addition entitled to other allowances amounting to Kshs.49,600 per month. The claimant was entitled to 36 working days leave per year and was entitled to Corporation's contributory Medical Scheme and Pension Scheme.

3. In terms of Clause (i) the petitioner was bound not to divulge information about the information obtained by virtue of his employment to 3rd parties and not to cause same to be publicized or disclosed to others.

4. The petitioner served the respondent continuously upon confirmation to his position and by a letter dated 15th July, 2008, the petitioner's basic salary was increased from Kshs.70,400 per month to Kshs 79,200 which was a 12.5% increase effective 1st July, 2008. This was within Job Group G6.

5. By a letter dated 17th December, 2008, the respondent's grading structure was changed and this brought the petitioner to a new Grade 6 with a salary bracket at between Kshs 60,000 to Ksh124,000. The basic salary of the petitioner was reviewed to Kshs.88,800 and was to be paid house allowance of Kshs.27,000 and transport allowance of Kshs.13,000.

6. Other benefits included medical outpatient and inpatient cover. These changes were effected from 10th December, 2008.

7. By a letter dated 29th January, 2009, the petitioner was deployed to IT department with a new title of Senior Systems Administrator effective 1st February, 2009.

8. On 8th May, 2009, the petitioner received a Show Cause letter for improperly executing an assignment relating to the payment of the first and final 2008 Dividend for Centum Investment Limited, hence adversely exposing the corporation to loss and detriment stated in the letter. The petitioner was required to respond to the Show Cause Letter which he did by a letter dated 13/5/2009. The petitioner was given a written warning dated 13/5/2009.

9. By a letter dated 26th April, 2012, the petitioner was informed that the management committee had deliberated on the petitioner's eligibility for promotion to Grade G5 and had deemed it inappropriate to promote the petitioner for reasons placed in the letter.

10. The petitioner responded to the letter by a letter dated 30th April, 2012 contesting the reasons advanced by the management committee for not promoting the petitioner. The management committee responded to the petitioner by a letter dated 15/5/2012 and informed the petitioner that the decision not to promote the petitioner was final for reasons given in the letter.

11. By a letter dated 21/12/2015, the petitioner was promoted from Grade 6 to Grade 5 with effect from January, 2016. The petitioner's new designation was Principal ICT Officer and was placed on a basic salary of Kshs.136,400 and the house allowance was increased to Kshs.50,000 and travelling allowance of Kshs 14,000. The leave entitlement and other privileges were to be governed by the Code of Staff Rules and Regulations in force from time to time.

12. By a letter dated 1st July, 2008, the petitioner applied to the respondent to allocate him a parking space in Uchumi house. The respondent approved the application and allocated the petitioner Bay number 38 upper Basement with effect from 1st July, 2008. Fee was payable monthly in advance at the rate of Ksh 600 per month. The petitioner was to pay an initial fee of Kshs.2,496 comprising of 3 months deposit and July, 2008 fees and 6% Value Added Tax (VAT). The petitioner was informed that deposit for the parking bay was refundable on termination of the agreement upon grant of one month's notice.

13. By a letter dated 7th April, 2017, the petitioner wrote a letter of resignation to the Acting Executive Director of the respondent, Mr. Antony Kibando Wanjiku. The letter reads:-

“REF: Resignation from the services of the Corporation

As required by the terms of the employment, I hereby give you one month notice of my intention to leave the services of the corporation. Over the last eleven years, or so that I have been an employee of the corporation, it has been a very difficult time for me. I have gone through all manner of conditions and situations especially from the Human Resource Manager, Mrs Faith Diama Neire. She engaged in witch hunt and practiced discrimination. I wish the corporation all the best in future.

Yours sincerely

Antony Watuku

Cc

Acting ICT Manager

Human Resource Manager.”

14. The corporation responded to the letter of resignation by a letter dated 30th May, 2017. The Corporation noted that the petitioner had not in the letter of resignation proposed how to settle the outstanding house deposit loan amounting to Kshs 908,335.18 as at 7th May, 2017 and Kshs 21,512, owed as outstanding parking fees to the Corporation.

15. The petitioner also had a staff development loan of Kshs 130,943.24 as at 7th May, 2017, which the petitioner had requested it be deducted from salary arrears amounting to Kshs 230,311.40 and a balance of Kshs 99,368.10 be paid to the petitioner.

16. The corporation advised that the petitioner was entitled to 24 days leave not taken.

17. The Corporation used terminal dues owed to the petitioner to offset some of the petitioner's liability amounting Kshs 924,718.55 as at 31st May, 2017.

18. The Computation was attached to the letter.

19. The petitioner disputes the parking fees in the sum of Kshs 21,512 stating he had no motor vehicle during the period 31st January, 2013 to 30th June, 2015.

20. The petitioner also produced medical records to show that he developed occupational diseases of eye sight impairment; Diabetes and

High Blood Pressure as a result of long working hours at the office.

21. The official working hours for the petitioner as from 30th September, 2014 was 9.30 a.m. to 6.30 p.m.

22. The petitioner alleges that there was systematic bias in promotion of staff which was skewed to his disadvantage and stunted his career progression and was passed by his junior staff. That the staff appraisals were biased to his loss and detriment; that he was issued a warning letter on non-issue in the year 2009, to which he protested. That he was unfairly surcharged over car parking when the petitioner did not own a car and in any event by an email communication dated 23rd June, 2015, the respondent stopped charging its staff for parking to increase employees motivation and satisfaction effective 1st July, 2015. That the petitioner had sold his car Toyota Premio KAX 330T in October, 2009 and the respondent had authorized the sale by a memo dated 21st October, 2009.

23. That the petitioner was not paid back pay and pension as set out in the petition because salary increments that went beyond his job groups scale were paid as one-off ex-gratia which did not attract pension. That as a result the petitioner lost competitive salary increments in the sum of Kshs 1,986,337.88 which would have attracted pension (now lost) in the sum of Kshs 344,917.9.

24. That the petitioner was not paid acting allowance in terms of Clause 494.1.1 of the ICDC Code of Staff Rules and Regulations between the period November, 2014 to April, 2015 when he acted in a higher position for a period of more than 30 days consequently. The petitioner claims Kshs 74,400 as lost acting allowance.

25. The petitioner further claims lost salary adjustment at 38.87% on his monthly salary for the period January, 2017 to July, 2017. That by a letter dated 14/7/2017, the respondent informed the petitioner that he could not get the increased salary in arrears since he had already resigned when the review of structure was effected.

26. The petitioner further claim Kshs 270,072.00 being salary increment that was not effected for the period July, 2015 to June, 2016 though he had scored 84% performance rating for the year under review.

27. Furthermore, the petitioner claims that he was entitled to payment of Bonuses for the year 2015/2016 based on his score of 84% for the year under review. As a result he lost Kshs 244,575 in payable bonuses

28. In addition the petitioner claims overtime in that he was supposed to work from 8.00 am. to 5 pm. from Monday to Friday in terms of the Staff Code of Regulations and his letter of appointment.

29. The petitioner did daily system back-ups and ran daily routine programs for the office mission critical systems which back up could only be done after office hours at 5 p.m. or when all system users have logged off the systems. That the petitioner also did monthly and annual system's updates. That as a result, the petitioner worked overtime and at the time of separation the overtime had accumulated to 9,312.08 hours which translate to Kshs 6,468,368.65. The petitioner claims the amount.

30. Furthermore, the petitioner prays for payment in lieu of 28 leave days not taken in the sum of Kshs 238, 403.8.

31. The petitioner in addition claim unpaid salary for 7 days worked and not paid in May, 2017 in the sum of Kshs 45,257.61 whilst he served notice.

32. The petitioner alleges that he developed occupational illness due to failure by the respondent to provide him with protective gear and worked under an unstable environment. As a result he developed weakened Retina, diabetes mellitus type 2 and hypertension, untreatable conditions which the petitioner will live with for life. That on 29th September, 2016, the petitioner wrote an internal memo complaining about long working hours and the Human Resource Manager wrote a response to the petitioner upon discussion and changed his working hours.

33. The petitioner complains that his terminal dues were withheld in respect of a house Deposit Loan in the sum of Kshs 1,250,000 at an interest rate of 5% per month which loan was and still is charged and secured by L.R. No. Thika Municipality Block 18/1681, the petitioner's property.

34. The petitioner states that he was constructively dismissed from work taking into consideration the cumulative unfair and unconstitutional labour practices meted on him and irreparable damage to his personal health, which condition led to his resignation.

35. The petitioner pleads that the aforesaid conduct violated his constitutional rights under Articles 26,27,28,41, 43 and 260 of the Constitution of Kenya, 2010 as outlined in the petition, and prays to be awarded as set out in the petition.

Response

36. The respondent filed a replying affidavit sworn to by Faith Nene, the Human Resource Manager of the respondent who has by and large confirmed the employment, promotion, remuneration and the various appraisal and salary reviews as set out by the petitioner.

37. The deponent denies that there was any bias in the promotion of the petitioner and that the petitioner's employment was regulated by the letter of Appointment, the staff Code of Regulations and the various policy documents issued from time to time regulating specific aspects of the petitioner's terms and condition of service attached to the replying affidavit.

38. The respondent states that at no time did the respondent act contrary to the contractual instruments aforesaid and puts the petitioner to

strict proof thereof.

38. That in particular, the promotion of the petitioner, contrary to his allegations in paragraphs 4 to 20 of the supporting affidavit was regulated by the promotion towards excellent policy and career progression promotion policy both marked exhibit 'FN9" and FN110."

39. The documents state the criteria for promotion including performance of an employee, length of service and that absence of a suitable replacement should not be an automatic reason for promotion. That promotion was at the discretion of the respondent subject to availability of a vacancy, possession of the required academic and professional qualifications, competence and open competition of all deserving staff through interviews.

40. That indeed paragraph 3.7 of the Code of Staff Rules and Regulations provide:-

“3.7 promotions

The Promotion of an employee will be at the sole discretion of the Corporation and shall depend on availability of a vacancy within the existing establishment and shall be based on performance, professional qualification, merit and where applicable, seniority.”

41. The respondent states that the petitioner requested to be promoted to Grade 5 in a memo to the Human Resource and Administration Manager dated 10th April, 2012 marked “FN12.”. By a memo dated 25th April, 2012, the deponent informed the petitioner at a meeting held by the management team on 5th April, 2012 that he could not be promoted at the time on account of poor customer service, wanting general attitude and failure to take initiative to advance his career. That the petitioner was advised to liaise with his supervisor and develop a suitable improvement programme to address identified areas of weakness. See “FN13”.

42. The petitioner did not accept the guideline provided to him above and challenged it through his letter dated 30th April, 2012 “FN14.”

43. However, at a general staff upgrading carried out of all staff effective 1st January, 2016, the petitioner was promoted from Senior IT Officer – Grade 6 to Principal ICT Officer Grade 5. The promotion was communicated to the petitioner by a memo dated 21st December, 2015 and his salary was adjusted to Kshs136,400 as per Exhibit “FN16.”

44. The respondent denies any bias in appraisal of the petitioner and that at all times the appraisal of the petitioner was conducted as per the Performance Management Policy exhibit “FN17”. That the document attached by the petitioner as exhibit, AKW13” is not the Respondent’s performance management policy and the cover page of that document has been imposed by the petitioner.

45. That the ICDC Rewards and Sanction Framework is part of a different document and so is the Staff Performance Management System document all mashed into one document by the petitioner wrongly.

46. That the rewards and sanctions Framework guided performance rewards and sanctions to reward exemplary performance and administer sanctions for poor performance and to motivate employee to have positive attitude to work with a view of enhancing productivity of the corporation.

47. The deponent outlines all the petitioner’s final annual appraisal scores and reward during his employment and concluded that the petitioner was at all times appraised properly and was never harassed, intimidated and discriminated as alleged or at all.

48. In the year 2015/2016, the petitioner had scored himself at 88%but the moderation committee recommended to the supervisor to re-appraise the petitioner and the petitioner was scored 64% which was rated a fair score. This score invited sanction to be placed on the employee in the form of having the employee go through a Performance Improvement Plan (PIP).

49. The petitioner appealed this decision to the Chairman of the Moderation Committee as per exhibit “FN21.”

50. The appeal was considered and the petitioner was given opportunity to re-appraise himself per “FN22.”

51. The petitioner was then awarded a score of 72% based on the fresh re-appraisal. These procedures of appraisal were applied across the board and there is no evidence that the petitioner was at any time discriminated by the deponent or by the Moderation Committee.

52. The deponent further states that the policy to award ex-gratia payment in lieu of salary increment in a situation, where an employee would if awarded an increment burst his salary scale is contained in the “Incentive and Sanction Policy.” Produced and marked “FN23.”

53. The respondent denies that it at any time downgraded the petitioner and that he was denied salary increments.

54. With regard to the issuance of warning letter to the petitioner, the respondent states that the same was justified and was issued upon following due process. The petitioner did explain the circumstances and annexures “8A, 8B and8c” capture the whole situation.

55. The respondent states that indeed the petitioner admitted that he used the wrong data to prepare a report and his negligent oversight led to several discrepancies to the embarrassment of the respondent.

56. That discipline was the preserve of management and each case was treated fairly according to the laid down policy, procedure and on its

own merit. The respondent denies that any rights of the petitioner were violated as alleged or at all.

57. With regard to the issue of parking fees, the respondent states that the petitioner was advanced a car loan of Kshs 836,000 and was upon his request on 1/7/2018 allocated Bay No. 38. That in terms of the agreement of allocation, either party could give one month's notice to terminate the agreement. That the petitioner was granted permission to sell the car on 16/10/2008 since it was still on loan. The petitioner did not give any notice that he wanted to stop the use of the parking bay. Moreover, he could park any other vehicle at the parking bay.

58. In June, 2015 the respondent approved free parking for its employees effective 1st July, 2015. The employees were informed that those who had arrears as at 30th June, 2015 were required to liquidate the outstanding amounts. The petitioner did not liquidate his outstanding arrears.

59. That by a letter dated 7th April, 2017, the petitioner resigned from his employment alleging that he had been mistreated during the last eleven years of service.

60. The respondent did not contest the resignation but wrote a letter dated 30th May, 2017, reminding the petitioner of liabilities due to the respondent. That the petitioner was given particulars of those liabilities including parking fees upon his records by a letter dated 8th June, 2017. The respondent states that the petitioner owes Kshs 21,512 to the respondent in respect of parking bay.

61. With regard to back pay and pension, the respondent states that the claims by the petitioner makes no sense at all. The petitioner was paid ex-gratia payments where salary increments exceeded his scale in the financial year 2013/2014 and 2014 /2015. The sum paid represented the amount he would have earned on a monthly basis if he was given a salary increment. The petitioner did not lose anything but gained compared to those who had their salaries adjusted as he was able to receive a lumpsum of what he would have received over twelve months' period.

62. With regard to the alleged loss of Pension, the petitioner's claim is also unfounded because pension deductions were remitted to the relevant scheme on a monthly basis and the same was paid until the petitioner left his employment.

63. Furthermore, a dispute on pension entitlement cannot form a subject matter of a Constitutional petition or an employer/employee dispute based on a contract of employment. If the dispute was genuine, it ought to be referred to the Chief Executive Retirement Benefits Authority.

64. With regard to special duty allowance, the respondent states that the petitioner was never appointed to act in the position of Mr. Benjamin Otieno as alleged at paragraph 62 to 68. That the petitioner was approached to act in the position but had declined. That Mr. Otieno was then allowed to devolve 70% of his time in the IT Department and 30% of his time in his new posting. Later on one Mr. Onesmus Muoko was hired to fill in the gap in IT Department during intervals of Mr. Otieno's absence. See "FW33" handwritten notes of the petitioner's supervisor.

65. The respondent states therefore the petitioner is not entitled to any special duty allowance as claimed or at all.

66. As regards the salary structure, the respondent asserts that the petitioner ceased to be an employee of the respondent upon his resignation on 7th May, 2007. That any salary structure established after the resignation of the petitioner could not be applicable to him therefore. That the new salary structure was approved by the Board on 27th June, 2017 to its existing employees and was implemented with effect from 1st January, 2017. This claim according to the respondent is misconceived.

67. With regard to the salary increment from the year 2015/2016, the respondent states that the Board approved a general upgrade for all staff effective 1st January, 2016. The petitioner was promoted from Senior ICT Officer Grade 6 to Principal ICT Officer Grade 5 with a basic salary of Kshs 136,400. That the appraisal ratings for the period were not considered as a basis for the general upgrade. This affected all employees. After all, the Petitioner had not scored 84% in his rating but 72% upon moderation.

68. That no bonus was declared nor was any employee entitled or paid any bonus for the financial year 2015/2016.

69. As concerns overtime, the respondent denies that the petitioner was entitled to payment of any overtime as alleged or at all. That it is true the official working hours for the petitioner was between 8am to 5pm. That respondent could from time to time require the petitioner to work additional hours as per the letter of appointment and the code of staff Rules and Regulations. That none of the two documents provided for payment of overtime and the petitioner did not at any time during the tenure of his work request and/or demand to be paid overtime. In any event, where an employee worked additional hours beyond the normal working hours, the code of staff Rules and Regulations Clause 2.10 provided that an employee could be compensated by rest days for support staff but not management cadre in which the petitioner was placed. The petitioner raised the issue of working hours with his supervisor and the same were adjusted as per exhibit "FN34.". The claim for payment of overtime is therefore without basis and is denied *in toto*.

70. With regard to accrued leave days, the respondent states that the petitioner was entitled to 24 leave days which were wholly commuted to cash and the money was offset against the petitioner's indebtedness to the Respondent. This claim has no merit therefore.

71. The respondent deposes that the health needs of the petitioner and its employees were taken care of by a medical cover and a conducive and safe healthy working environment. That at no time did the petitioner request to be given protective gear and his work did not require any such gear. That the petitioner was a member of the respondent's Safety and Health Committee and had been taken for training in matters relating to safety and health at the work place as per exhibits 'FW35 and 36 deed.

72. That as early as March, 2008, the petitioner was admitted at Nairobi Hospital claiming that he had an eye problem but the Discharge

summary report released to the respondent indicated that he was suffering from Gastroenteritis and hypertension. In a memo dated 29th November, 2014, the petitioner complained of excess working hours and he was allowed to work on flexible working hours, as per exhibit "FN40". The petitioner complained for the first time that he had been admitted in hospital in January, 2013 with acute high blood pressure and diabetes and alleged that these were occupational diseases due to work load. This notwithstanding, that he had endured hypertension since 2008 and had tried to hide his medical condition from the respondent. The petitioner never reported any occupational disease to the Director Occupational Safety and Health Services for purposes of assessing his disability. This claim is misconceived and without merit and it be dismissed.

73. As concerns the house deposit loan, the petitioner applied for a house loan of Kshs 1,250,000 on 17/9/2015 and the loan was granted to him against a charge on property known as LR No. Thika Municipality Block 18/1681. That as at 7/5/2017, being the date of his exit, the petitioner still owed the respondent Kshs 908, 335/18 against the advanced loan. The petitioner was by a letter dated 25th April, 2017 asked to give proposals on how he intended to liquidate the outstanding house loan and staff Development Loan.

74. The petitioner responded by stating that the respondent was not exposed by the loan and that the respondent owed the petitioner salary arrears that should cover development loan from 20/6/2017 deserved salary raise.

75. The petitioner has therefore not paid the outstanding house loan nor made any attempt to service it and the respondent will initiate recovery processes according to the charge after giving credit to the money due to him or leave entitlement and days worked in May, 2017 and not paid for.

76. The respondent denies that the petitioner was constructively dismissed as alleged or at all having resigned voluntarily from his employment. The respondent denies that it has violated any of the alleged rights of the petitioner under Articles 26, 27, 28, 40, 41, 43, 47 and 260 of the Constitution of Kenya, 2010 and puts the petitioner to strict proof thereof.

77. The respondent denies that the petitioner is entitled to any special or general damages as claimed or at all.

78. The petitioner filed Supplementary Affidavit on 13th June, 2019 in which the petitioner reiterates all the assertions made in the petition and supporting affidavit and joins issue with the respondent on matters denied by the respondent and prays that the petitioner be awarded as prayed.

Determination

79. The parties filed submissions and list of authorities and the issues for determination in this matter are:-

(i) **Whether the Court should strike out and expunge from the record the documents identified by the respondent in the application dated 31st May, 2021 for having been obtained irregularly and without authority of the respondent.**

(ii) **Whether the claim brought in this petitioner ought to have been commenced otherwise by way of a Constitutional Petition.**

(iii) Whether the Petitioner is entitled to the reliefs sought in the petition.

80. In **Baseline Architects Limited and 20 others versus National Hospital Insurance Fund Board Management (2003) eKLR** quoted by the Respondent, the trial Court made reference to the House of Lords decision in **Konway -vs- Limmer (1968) 1 All ER 874** where Lord Reid said in relation to improperly obtained documents that:-

"It is universally recognized that here there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. There are many cases where the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it. with regard to such case, it would be proper to say, as Lord Simon did that to order production of the document in question would put the interest of the state in jeopardy, but there are many other cases where the possible injury to the public service is much less and there one would think that it would be proper to balance the public interests involved. I do not believe that Lord Simon really meant that the smallest probability of injury to the public service must always outweigh the gravest frustration of the administration of justice."

'As stated it is a general principle of law well founded on public policy and recognized by the constitution and Cap 80 Laws of Kenya that documentary evidence may be withheld or an answer to any question may be refused on the ground that the disclosure of the document or the answering of the question will be injurious to the public. My position is that the production of documents should only be withheld where the public interest would otherwise be damnified. I agree that there is much to be said in favour of disclosure that is whether the documents subject to the dispute constitute an important part of the material on which the respondents would need to object to the setting aside application'

..... 'It is therefore my decision that the documents which the intend to rely and which are annexed to the two affidavits are documents which this court considers that their existence and contents are so probable that a prudent man ought not to allow for their production. The said documents if allowed to be produced would hinder the position of the Judge who will consider the case of the parties in determining whether to allow the application to set aside the award. In essence there is a

great deal of possibility that the documents would prejudice the case of the applicant. I therefore think that justice does not require them to be produced’.

81. In answer to issue no 1 above, it is my view that no basis has been laid in the response affidavit as to how the inclusion of the impugned evidence would prejudice the Respondent Company ie the harm to public interest that would be occasioned as a result of the inclusion. The court therefore declines the invitation to strike out and or expunge the documents

82. The petitioner resigned from employment by a letter dated 7th April, 2017. The petitioner gave the respondent one month notice before he stopped working for the respondent. The petitioner stated in the letter that he had experienced very difficult times whilst he served the respondent for the past 11 years and cited the Human Resource Manager, **Mrs Faith Diama Nene** as the source of his problems. The petitioner stated that Mrs Faith Diama Nene had engaged in witch hunt and practiced discrimination.

83. The petitioner cites examples of alleged harassment to include bias in promotion. The petitioner stated at paragraph 27 of the petition that in the 11 years he served the respondent he was never promoted out of sustained malice. This deposition is contradicted by the evidence before Court in that the petitioner was employed on 27th February, 2006 in the position of Senior ICT Officer earning a basic salary of Kshs.70,400 and allowance of Kshs 49,600 per month.

84. By a letter dated 15th July 2008, the petitioner’s salary was increased from Kshs 70,400 to Kshs 79,200 per month.

85. By a letter dated 17th December, 2008, the petitioner’s salary was reviewed to Kshs 88,800 and the allowances were also increased to 42,000.

86. By a letter dated 21st December, 2015, the petitioner was promoted from Grade 6 to Grade 5 with effect from January, 2016. The petitioner’s new designation was Principal ICT Officer and his basic salary was raised to Kshs 136,400 and his allowances increased to Kshs 64,000.

87. The deposition that the petitioner was not promoted for the entire period he served the respondent is therefore devoid of any truth and is found to be without merit by the Court.

88. The petitioner claimed that there was bias in staff appraisal and that he was targeted for grant of a warning letter.

89. Again the testimony before Court does not demonstrate that the petitioner was given a warning letter without justification. The respondent tendered evidence which was not contradicted by the petitioner to the effect that the petitioner had negligently executed an assignment relating to the payment of the first and final Dividends for the year 2008, hence adversely exposing the corporation to loss and detriment. The petitioner was given opportunity to explain himself by a show cause letter dated 8th May, 2009 to which he responded by a letter dated 13th May, 2009. The respondent was not satisfied with the explanation the petitioner gave and issued the petitioner with a warning letter dated 13th May, 2009.

90. The petitioner failed to prove that he was being maliciously harassed for no offence committed. To the contrary, the respondent demonstrated that it had a valid reason to issue the petitioner with a warning.

91. The petitioner again failed to prove on a balance of probabilities that the refusal by management of the respondent to promote the petitioner which decision was communicated by the respondent by a letter dated 26th April, 2012 was actuated by bias and/or malice. The respondent had provided sound reasons in the letter for the failure to promote the petitioner at the time from Job Grade 6 to Job Grade 5.

92. The petitioner contested the reasons given for the failure to promote him by the respondent by a letter dated 30th April, 2012. The respondent responded to the said letter by a letter dated 15th May, 2012 reiterating that it had good reasons not to promote the petitioner at the time. The evidence tendered by the petitioner failed to demonstrate that this decision not to promote him was rooted in malice and or discrimination by the management team and in particular by the Human Resource Manager. It is the Court’s considered view and finding that the matter of appraisal and promotion of the petitioner was dealt with in a fair and professional manner and the allegations of discrimination advanced by the petitioner are devoid of any merit. Discipline and promotion are the prerogative of management provided due process is followed. In the present case, there is no evidence tendered as to how the respondent violated the rights of the petitioner to fair administrative action, to fair labour practices and fair hearing.

93. Furthermore, the allegation that the petitioner was unfairly charged, deducted and surcharged car parking unfairly is again not supported by any tangible evidence. The respondent ably demonstrated that the petitioner had signed a contract renting a parking in the premises of the respondent and that the petitioner parked his car at the designated parking and did not at any specific time write to the respondent to inform them that he had stopped using the parking. Furthermore, the claimed rental was for the period prior to the change of policy upon which the respondent had stopped charging its senior managers any parking fees. This is not evidence of discrimination as contended by the petitioner and the allegations by the petitioner in respect of this matter lacks merit.

94. In sum, the allegations by the petitioner that the respondent had violated Articles 41 of the Constitution by subjecting the petitioner to unfair Labour Practices are devoid of any merit and the specific claim is dismissed.

95. On the allegations of violation of Article 27 of the Constitution by discriminating against the petitioner, the Court finds that the petitioner failed to substantiate sufficiently the allegations and the claim is devoid of merit and is dismissed.

96. The petitioner further claimed that his rights under Articles 40, read with 260 of the Constitution to own property was violated by the

respondent by unlawful surcharge of parking, directing the petitioner's to refund parking fees, failure to pay the petitioner back pay and pension; special duty allowance; arrear salary paid to employees after the petitioner had resigned from employment, Bonus overtime and for accrued leave, the Court finds that if these were genuine claims they ought to have been filed before Court by way of a memorandum of claim in terms of the Employment and Labour Relations Court Act, 2014 read with Employment and Labour Relations Court (Procedure) Rules, 2016. A dispute regarding failure by an employer to pay benefits arising from a contract of employment cannot be elevated to a constitutional matter and violation of property rights under Articles 40 and 260 of the Constitution. Indeed this is a classic case of abuse of process where a party completely ignores applicable statutes and Rules of Court in bringing a claim before Court. This habit must be discouraged by rejecting such pretensions of alleged violation of rights on straight forward disputes arising from contract of employment.

97. The Supreme Court decision in **Communications Commission of Kenya & 5 Others –vs- Royal Media Services Limited & 5 Others** case had the **following on Constitutional Petitions: -“ Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru –vs- Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.” Similarly in Constitutional Petition Number 113 of 2015, Turkana County Government and 20 others versus the Attorney General and others it was held that claims of statutory violations cannot give rise to constitutional violations”**

98. In the present case, the respondent sufficiently rebutted each and every of the claims set out under paragraph 125 (a) to (j) of the petition and the Court is of the considered finding that the petitioner failed to prove on a balance of probabilities that he was owed by the respondent any of the items set out thereunder. The Court therefore dismisses each and every claim set out under paragraph 125 (e) to (j) for lack of merit.

99. Indeed, the complaint that the respondent violated Article 43 of the Constitution by paying increments accorded employees of the respondent and the petitioner in particular by way of 'ex-gratia' payment came forth as an after thought by the petitioner upon his resignation. The petitioner did not provide any evidence that he had at any one time objected in writing or otherwise to the salary increments paid to him from time to time by way of exgratia. The Court was satisfied by the explanation given by the respondent that 'exgratia' payments were effective in cases such as that of the petitioner where additional salary increment would have taken them beyond their salary Grade. That such eventuality eventually led to structural review of the positions in the Corporation as had happened in respect of the petitioner. In any event, the alleged underpayments were mostly caught by the doctrine of Latches having arisen more than three (3) years from the date alleged cause of action arose.

100. The Court specifically finds that the respondent did not violate the rights of the petitioner to Protection of economic and social security under Article 43 of the Constitution.

101. Furthermore, the petitioner also failed to prove to the satisfaction of the Court that the respondent at any one time violated the petitioner's right under Article 47 of the Constitution. At all material times canvassed in the petition whether relating to the contract of employment; Appraisal and review of salary; promotions and disciplinary action taken by the respondent, the respondent satisfactorily demonstrated that it had treated the petitioner fairly and had accorded him opportunity to explain himself in all instances the petitioner had complained of. This claim therefore equally lacks merit and is dismissed.

102. The respondent did not violate the principle enunciated in the case of **Mirugi Kariuki –vs- Anthony General – Nairobi Civil Application No. 70 of 1991** cited by the petitioner. The respondent in all the instances herein demonstrated it had exercised its mandate in a fair and just manner and not maliciously and/or capriciously as alleged by the petitioner or at all.

103. Equally unfounded are the allegations by the petitioner that the respondent had violated his right to protection of life and human dignity under Article 26 and 28 of the Constitution. To the contrary the petitioner had served the respondent for a continuous period of 11 years. In that period, the petitioner did not produce any written complaint and/or protest to the respondent regarding all the matters now complained of. The only times the petitioner wrote to the respondent was in answer to a show cause letter written to him and was given a warning and regarding the unfavourable appraisal he had received from his immediate supervisor and when he was denied promotion at one time and finally the letter of resignation.

104. In other words, the petitioner did not provide a documented chronology of alleged harassment; discrimination; bias; and malice from for the Human Resource Manager as alleged in this petition or at all to prove constructive dismissal.

105. The inevitable conclusion by this Court is that matters raised in this petition are just an afterthought upon resignation by the petitioner.

106. The petition therefore lacks merit in its entirety and is dismissed with no order as to cost taking into account the long and good service the petitioner had given the respondent.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2021

MATHEWS N. NDUMA

JUDGE

Appearances

Echana and Bwire Advocates LLP for the petitioner

Obura Mbeche & Co. Advocates for the Respondent

Ekale – Court Assistant