



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION 103 OF 2018**

**(Before Hon. Justice Hellen S. Wasilwa on 21<sup>st</sup> January, 2020)**

**DAVID GICHERU.....PETITIONER**

**VERSUS**

**GICHEHA FARMS LIMITED.....1<sup>ST</sup> RESPONDENT**

**BROOKSIDE DAIRIES LIMITED.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1. The Petitioner, David Gicheru filed a Petition dated 27<sup>th</sup> September 2018 on 03/10/2018 against Gicheha Farms Limited, the 1<sup>st</sup> Respondent and Brookside Dairies Limited, the 2<sup>nd</sup> Respondent.
2. He avers that he was initially retained as a Security Guard at the 1<sup>st</sup> Respondent's premises before applying and taking up employment as a Plumber at the said dairy farm located in Ruiru Kiambu on 07/09/2015. That he was tasked with monitoring, maintaining and repairing all plumbing works across the 2000 acre farm and that he worked over weekends, overtime and was on call for any plumbing emergencies that arose.
3. He avers that while undertaking his duties at the farm sometime in 2017, the Respondents caused him to be photographed without consent and that the 2<sup>nd</sup> Respondent published his image on its various marketing media including wall calendars which were used across Kenya, Uganda and Tanzania and on its website.
4. That he thereafter diligently sought audience with the Respondents for such compensation that was due to him but despite being promised the same, no compensation was given to him. That when he opted to pursue a legal claim, the Respondents insisted he drops the claims in favour of compensation to which he refused and which led to him being summarily dismissed on 2<sup>nd</sup> July 2018.
5. The Petitioner avers that his constitutional freedom from slavery or servitude under **Article 30 of the Constitution** was violated by the 1<sup>st</sup> Respondent who exploited his labour for private gain.
6. That the salary he was paid did not reflect the indispensable role his services played in the smooth running of the Respondents' operations and was further disproportionate to the financial ability of the Respondents. That the wages paid to him made him unable to meet his basic needs and condemned him to a life of strenuous indignity.

7. That the Respondents further violated his right to fair labour practices under **Article 41** since he single-handedly attended to mechanical maintenance and repairs at the 1<sup>st</sup> Respondent's extensive farm for long hours with minimal rest and that his remuneration was grossly inconsistent with his years of service.

8. He also avers that the Respondents' act of photographing him was an invasion of his right to privacy under **Article 31** and that the copyright in his image was exploited by the 2<sup>nd</sup> Respondent for commercial gain without consent or sufficient compensation.

9. The Petitioner contends he was terminated for a reason of a private dispute between him and the 2<sup>nd</sup> Respondent, which matter was independent of his services to the 1<sup>st</sup> Respondent.

10. That the grounds for terminating his employment are not captured in the Employment Act and that he was not offered a fair opportunity to resolve the said dispute with the 2<sup>nd</sup> Respondent.

11. That the 1<sup>st</sup> Respondent failed to afford him a fair hearing and that the way in which he was dismissed fell afoul of due process, fair administrative action and access to justice. He prays for the following:-

*a) A Declaratory Order do issue that the Petitioner's rights have been violated.*

*b) A Declaratory Order that the Petitioner was subjected to slavery and/or servitude.*

*c) Damages for wrongful dismissal and unfair termination.*

*d) General damages for breach of right to privacy and copyright infringement.*

*e) Exemplary damages.*

*f) Interest on (a), (b) and (c)*

*g) Costs of this suit*

*h) Any other remedy/remedies this Honourable Court deems fit to grant.*

12. In the Supporting Affidavit, the Petitioner avers that he was employed by the 1<sup>st</sup> Respondent on 01/04/2014 as a security guard before getting the Plumber/General Maintenance job at the said premises later on.

13. That he was involved in manual duties for over 12 hours a day and that given the physical demanding work environment, he occasionally suffered health issues. That he was initially paid a gross salary of Kshs. 9,000/= per month and on 01/09/2017, his salary was revised to a gross figure of Kshs. 10,620/= per month.

14. He avers that on 10/05/2018, the 2<sup>nd</sup> Respondent's marketing agents further performed a similar marketing exercise for a proposed billboard initiative and made him sign various forms which he neither read or understood or was given copies of and that the Respondents then advised him that he would be paid for the two marketing exercises.

15. That after he served the demand letter dated 04/06/2018, he was summoned by the 1<sup>st</sup> Respondent's Farm Manager on 12/06/2018 and instructed to drop the court matter and subsequently summoned by the Operations Manager and the 2<sup>nd</sup> Respondent's Marketing Manager all of whom advised that his actions considerably harmed company interests.

16. He avers he was dismissed for his alleged unwillingness to cooperate and promote company interests and annexes documents marked **DG1** to **DG6** in support of the Petition.

17. The Respondents filed a Replying Affidavit dated 6<sup>th</sup> December 2018 sworn by their Group Human Resource Manager, Grace Manugu who avers that the Respondent companies are related/sister companies.

18. She contends that the Petition is bad in law and does not raise any constitutional issues for reasons that the alleged dispute between the Petitioner and them is contractual/civil/commercial and whose remedies are available under the Employment Act and that the common law, employment contract and general terms of service are paramount in determining the said dispute. She denies that the Petitioner was the sole Plumber of the 1<sup>st</sup> Respondent or that he worked over weekends, overtime and on call.

19. She admits that from time to time, the 1<sup>st</sup> Respondent used to advertise its dairy farm and allied activities in corporate and brand campaigns through calendars and digital media produced by the 2<sup>nd</sup> Respondent and that such adverts would take the form of pictures of its farm, animals, facilities and employees.

20. That on or about 2017, the Petitioner consented to being photographed for purposes of producing calendars by the 2<sup>nd</sup> Respondent and that the 1<sup>st</sup> Respondent as the employer also approved the same. That publication of the Petitioner's image was thus done in good faith and was not an invasion of his privacy or motivated by greed or profiteering and further, the 2<sup>nd</sup> Respondent did not make any sale of the said calendars at all.

21. She contends that the Petitioner never engaged or escalated the issue of infringement to the employer's HR Department despite being aware of the internal grievance processes and that it was HR officials who reached out to him when the matter came to the Respondents' attention through external sources.

22. She continues to aver that the Respondents severally engaged the Petitioner to settle the alleged infringement of copyright internally within the employment contract but he frustrated the efforts and insisted that the dispute be handled by his advocate.

23. That in view of the Petitioner's unwillingness to resolve the dispute, the 1<sup>st</sup> Respondent opted to terminate his employment since the employer employee relationship was greatly affected.

24. That upon termination of employment and in good faith, the 2<sup>nd</sup> Respondent paid the Petitioner an ex-gratia sum of Kshs. 101,050/= for agreeing to participate in the media campaigns and allowing the 2<sup>nd</sup> Respondent use his image in its 2018 publications and that he was also paid:-

*a. Salary for the days worked*

*b. Notice pay*

*c. 12 months compensation/termination notice*

*d. Outstanding leave days owing*

*e. Service pay for 4 years*

25. That the salary paid to the Petitioner was in accordance with the law and mutually agreed between the parties and so the allegations of underpayment, overworking, slavery, servitude and exploitation for private gain are unfounded and unmerited.

26. She contends that the Petitioner is thus not entitled to any prayers sought in the Petition further because all employment terminal dues together with compensation for images were fully paid to him. She annexes documents marked **GM1**, **GM3**, **GM4**, **GM5** and **GM6** in support of the Respondents' case.

27. On 19<sup>th</sup> June 2019, this Honourable Court directed that the Petition would be dispensed of by way of written submissions and when the matter was mentioned on 24<sup>th</sup> October 2019, the Petitioner confirmed he had filed his submissions.

### **Petitioner's Submissions**

28. The Petitioner submits that the Petition does set out alleged violations of the constitutional rights while at the same time making claim for breach of the contract of employment ordinarily prosecuted in an action before the industrial Court. That **Section 3 of the Employment and Labour Relations Court Act 2011** grants the court jurisdiction to handle employment related disputes expeditiously and proportionately.

29. That notably, **Rule 7(1) of the Employment and Labour Relations Court (Procedure) Rules** provides that a party is at liberty to seek enforcement of any constitutional rights and freedoms or any constitutional provision vide a Petition instituted in the employment court in accordance with the Constitution of Kenya Practice and Procedure Rules.

30. That Rule 7 is in line with **Article 159(2) (d) of the Constitution** which states that in exercising judicial authority, courts and tribunals shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities.

31. He invokes the opinion of the Court of Appeal in **Prof. Daniel N. Mugendi –v- Kenyatta University and 3 others, Civil Appeal No. 6 of 2012** where it was stated:-

*“The question now is whether the appellant should go back and “sever” the composite petition alleging violation of his fundamental rights and breach of contract of employment. Much as such a severance would entail time and resources to effect the necessary amendments and make due motions, we are of the view that with necessary amendments, which appear imperative to make out a clear use of breach of rights being effected, the appellant can and should be heard by the Industrial Court on the two claims i.e. violation of rights and breach of contract of employment. The position that the Industrial Court can and should entertain the claim as laid by the appellant, is in line with the decision of Majanja, J. in Petition No.170 of 2012–United States International University (USIU) vs The Attorney General & Others.”*

32. Further, that the decision of the court in **Prof. Moni Wekesa –v- Mount Kenya University [2018] eKLR** was that:-

*“...Thus, the Court holds that a litigant does not need to file an ordinary action and at the same time file a petition with respect to the same facts and transaction but for separate reliefs envisaged under an ordinary action and the petition. The Rule aims at making litigation efficient and cost effective without burdening the litigant with filing of numerous suits arising from the same transaction or set of facts so that all conceivable reliefs are made available in a single legal process or action.”*

33. The Petitioner submits that the Respondents have jointly and/or severally violated his constitutional rights guaranteed under **Articles 22,28,30,31 and 41 of the Constitution** and which violations occurred in the course of his employment. That the Labour Institutions Act and the Employment Act set out minimum rates of remuneration or conditions of employment which cannot be varied by agreement and that these laws further provide for regulation of hours of work.

34. That the Employment Act further provides for adequate rest periods for workers and limits hours of work but which the 1<sup>st</sup> Respondent ignored and varied to suit its own terms.

35. That the 1<sup>st</sup> Respondent over exploited him for commercial gain since he earned an income that was below par with the minimum statutory wages and that it consequently violated the government guidelines

on minimum wages. That he is therefore entitled to compensation for underpayment, overworking and the extra labour offered in vain.

36. It is submitted by the Petitioner that it is settled law that summary dismissal only arises from actions punishable by criminal sanctions and that misconduct is conduct that initially requires disciplinary actions other than dismissal. That the **International Labour Laws** define the term *misconduct* as:-

*“Behaviour, other than gross misconduct, which is improper, connected with the individual’s work, malicious, within the individual’s control, not a good faith error of judgment or discretion, and is either a deliberate refusal without good cause, to comply with the employer’s lawful and reasonable rules made known to the employee or a deliberate disregard of standards of behaviour the employer has a reasonable right to expect...”*

37. He contends that the grounds relied on and reasons given by the 1<sup>st</sup> Respondent in the letter of dismissal dated 02/07/2018 are invalid and do not warrant a summary dismissal and/or terminal proceedings.

38. That this Court in its previous decisions has emphasised the need for an employer to furnish the employee with valid reasons and/or grounds of misconduct as required under **Section 41 and 45 of the Employment Act** prior to termination of employment. He cites the case of **Liz Ayan –v- Leisure Lodge Limited [2018] eKLR** where the Court while declaring that termination of the Claimant’s employment by the Respondent was unfair, wrongful and unlawful held that where an employer fails to adhere to the mandatory provisions of Section 41 of the Employment Act, the resulting termination is unfair.

39. Further, that in **Shankar Saklani v DHL Global Forwarding (K) Limited [2012] eKLR**, the Court held that a notice and a hearing under section 41 of the Act are mandatory and necessary even in cases of summary dismissal.

40. The Petitioner avers that seeking compensation for copyright he owns does not qualify for misconduct or warrant summary dismissal and he was therefore unfairly, wrongfully and unlawfully terminated from employment. That it follows he is entitled to damages for unfair termination and cost of the Petition.

41. The Petitioner also submits that in **Ann Njoki Kumena –v- KTDA Agency Ltd [2019] eKLR**, the court declared that the defendant’s conduct amounts to infringement of the plaintiff’s right to privacy and awarded Kshs. 1,500,000/= general damages plus costs for violation of the defendant’s right under Article 31. Justice L.W Gitari in the above case went on to hold at paragraph 5 that:-

*“...the plaintiff has proved that the defendant took a photograph of herself, without her consent and that the defendant used her photographs for commercial purposes that is, advertisement of its products. No compensation was paid...The right is also guarantee under Article 31 of the Constitution which provides that“every person has a right to privacy which includes the right not to have their person home or property searched and, their possession seized.....”. Under the Article 40 the right to protection of the right to property is guaranteed. Article 28 guarantees the right to have the human dignity respected. The threshold for the claim is use of a plaintiff’s attribute for some gain by the defendant. Such attribute includes appearance, name and other personal attributes.... This was done in violation of the rights of the plaintiff which are entrenched in the constitution. Where a right is violated and the culprit has gained from that violation, the person is entitled to damages.”*

42. He further cites the decision of the **European Court of Human Rights** in the case of **C.N. and V. vs. France** where the seven judge bench awarded the Applicant damages in the sum of 30,000 Euros equivalent to Kshs. 150,585,600/= for violation of **Article 4 of European Convention on Human Rights** which prohibits slavery and forced labour and to which Kenya is bound as a member of the UN and AU.

43. The Petitioner submits that he continued to work for the 1<sup>st</sup> Respondent under forced, compulsory

labour and that the Consent Form/Agreement he allegedly signed was after he sought some modest compensation from the Respondents after other successive media campaigns by the 2<sup>nd</sup> Respondent.

44. That the date of the signature for the consent indicates the Respondent's cunningness and thus no consent was sought from him for use of his image and that he was only compensated by the Respondents after he was unfairly dismissed. That if indeed the sum of Kshs. 101,050/= was ex-gratia, they ought to have paid him the same earlier and not after he beseeched for the same and even involved a lawyer.

45. The Petitioner submits and asks the Court to find that he has wholly demonstrated and/or established legal or factual basis that his constitutional and labour rights were violated by the Respondents and that he has discharged the burden of proof that they misappropriated his personality for commercial gain. That all the reliefs he seeks in the Petition be availed to him with costs.

46. I have examined all the averments and submissions of both Parties.

47. From the Petition, the Petitioner alleges infringement of his rights to privacy by the Respondent who photographed him without his consent. He also avers infringement of his rights from slavery and servitude in that he was exploited in terms of labour for private gain by being paid little salary for work done.

48. He contends further that his right to fair labour practices were infringed upon as he was terminated by the Respondent when he refused to drop the case against the Respondent on photographing him.

49. The Respondent in their defence avers that the Petitioner agreed to be photographed and that this was not an invasion of his privacy and neither was it motivated by greed or profiteering.

50. There is no evidence however that the Claimant agreed to be photographed as per the 2018 calendar as the agreement the Respondent purportedly relies upon is dated May 2018.

51. The privacy of the Petitioner was indefinitely infringed upon as per Article 31 of the constitution which states as follows:-

***“Every person has the right to privacy, which includes the right not to have:-***

***a) their person, home or property searched;***

***b) their possessions seized;***

***c) information relating to their family or private affairs unnecessarily required or revealed; or***

***d) the privacy of their communications infringed.”***

52. Other than that, there is no indication that the Petitioner was paid for the use of his photo on the calendar. This is subjecting him to exploitation for private gain which is akin to slavery and servitude contrary to Article 30 of the Constitution which states as follows:-

***1) “A person shall not be held in slavery or servitude.***

***2) A person shall not be required to perform forced labour.”***

53. As for his dismissal, the Petitioner was finally dismissed for failure to agree to drop the case against the Respondent, which was his own right to pursue a legal claim. There is no proper valid reason that led to the Petitioner's termination.

54. The termination was not for any reason related to poor performance or anything related to his conduct

at work. The termination was therefore unfair and unjustified in terms of Section 45(2) of Employment Act which states as follows:-

**(2) “A termination of employment by an employer is unfair if the employer fails to prove:**

**(a) that the reason for the termination is valid;**

**(b) that the reason for the termination is a fair reason:-**

**(i) related to the employee’s conduct, capacity or compatibility; or**

**(ii) based on the operational requirements of the employer; and**

**(c) that the employment was terminated in accordance with fair procedure”.**

55. In terms of remedies as per the case of Anne Njoki Kumena vs KTDA Agency Limited (2019) eKLR (supra), the photographing of the Petitioner at work infringed his right to privacy under Article 31 of the constitution and also Article 28 on his dignity.

56. In this case, I find he is entitled to damages for the infringement and I award him 1.5 million as compensation accordingly.

57. For the unfair and unjustified dismissal, I award him:-

**1. 1 month salary in lieu of notice = 11,600.47**

**2. 12 months compensation for unfair and unlawful termination = 12 x 11,600.47 = 139,209.64**

**TOTAL awarded = 1,650,806.11**

***Less statutory deductions***

**3. The Respondent will also pay costs of this Petition plus interest at Court rates with effect from the date of this judgement.**

Dated and delivered in open Court this 21<sup>st</sup> day of January, 2020.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Parties