



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

PETITION NO. 89 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF THE PROVISIONS OF ARTICLES
41 AND 47 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE PROVISIONS OF SECTIONS
10, 11, 12, 13, 14, 15, 20, 41, 45, 47, 49 AND 51 OF THE EMPLOYMENT ACT

AND

IN THE MATTER OF ALLEGED UNFAIR TERMINATION
OF THE PETITIONER'S CONTRACT BY THE RESPONDENT

BETWEEN

FANUEL JOHN EMODO.....PETITIONER

VERSUS

CHINA QINGJIAN INTERNATIONAL

GROUP (KENYA) LIMITED.....RESPONDENT

JUDGMENT

The petitioner herein is a former employee of the respondent, a limited liability company registered in Kenya and engaged in road construction.

The petitioner was employed as a mechanic by a contract of

service dated 1st February 2018. The contract was for a fixed term of 17 months with an expiry date of 2nd July 2019. The salary of the petitioner according to the contract was Kshs.30,160 with a housing allowance of 20% of the basic salary per month.

It is the petitioner's case that although he is a certified mechanic Grade 1, the respondent who was aware of his qualifications engaged him on terms that were inferior to his qualifications. He further avers that the respondent failed to disclose to him that his employment was subject to a Collective Bargaining Agreement (CBA) signed between the respondent and Kenya Building, Construction, Timber and Furniture Employees Union registered by the court on 31st January 2018. He avers that the terms of his contract were less favourable than those in the CBA and therefore contrary to Sections 7, 8, 9, 10, 11, 12, 13, 14 and 20 of the Employment Act.

The petitioner avers that on 10th July 2018 he was assigned by his Supervisor to proceed to Kikuyu Road to repair the respondent faulty tipper registration No. KCN 7894 which had stalled on the said road. That the petitioner in the company of Philip Wanjama, a mechanic and

Kevin Mokurumi, a helper, proceeded to Kikuyu Road where they executed the necessary repairs on the tipper truck and upon completion returned to his place of work on Ngong Road. That upon return his supervisor remonstrated him publicly and ordered him to report to the Human Resource Officer. That the Human Resource Officer informed him that he will work up to the end of July 2018 upon which his contract would be terminated. That he was however dismissed on 11th July 2018.

He avers that he was singled out and unfairly dismissed without any wrongdoing or observance of a fair disciplinary process. The petitioner contends that the dismissal was unfair and unprocedural. That the same was in contravention of Section 45 of the Employment Act. That for the 5 months he worked for the respondent he was faithful and devoted to his duties which he executed with care and skill as a Grade 1 mechanic, and that he expected his contract to run its full term.

The petitioner avers that in breach of Section 20 and 21 of the Employment Act he was not issued with an itemised statement of pay and statutory deductions, that he was unable to ascertain what he was paid as overtime and would crave an order compelling the respondent to produce his employment records as well as certificate of service. He further avers that he was underpaid as according to the CBA he was entitled to be remunerated as follows –

(a) February 2018

4 Sundays in February, 8 hours each at the rate of Kshs.178,5 per hour.

4 Sundays x 8 hours x 178.5 x 2..... 11,424

4 Saturdays x 5 hours x 178.5..... 3,570

4 x 3 x 178.5 x 1.5..... 3,213

20 weekdays x 8 hours x 178.5..... 28,560

46,767

(b) March 2018

4 Sundays + 1 public holiday

5 x 8 x 178.5 x 2..... 14,280

5 Saturdays 5 x 5 x 178.5..... 4,462.50

5 x 3 x 178.5 x 1.5..... 4,016.25

21 weekdays 20 x 8 x 178.5..... 29,988

52,746.75

(c) April 2018

4 Sundays + public holiday

6 x 8 x 178.5 x 2..... 17,136

4 Saturdays 4 x 5 x 178.5..... 3,570

4 x 3 x 178.5 x 1.5..... 3,213

20 weekdays x 8 hours x 178.5..... 28,560

52,479

(d) May 2018

4 Sundays 4 x 8 x 178.5 x 2..... 11,424

4 Saturdays 4 x 5 x 178.5..... 3,570

4 x 3 x 178.5 x 1.5..... 3,213

23 weekdays 23 x 8 x 178.5..... 32,844

51,051

(e) June 2018

4 Sundays + public holiday

6 x 8 x 178.5 x 2..... 17,136

5 Saturdays 5 x 5 x 178.5..... 4,472.5

5 x 3 x 178.5 x 1.5..... 4,016.25

Weekdays 19 x 8 x 178.5..... 27,132

52,746.75

Total Kshs.255,574.50

That instead, admitted he was paid the following –

February 2018 Kshs.25,600

March 2018 Kshs.29,000

April 2018 Kshs.37,000

May 2018 Kshs.32,000

June 2018 Kshs.35,000

Kshs.158,600

The petitioner further avers that he would have earned a total of Kshs.647,139.75 had he worked to the end of his contract.

The petitioner further claims additional benefits as follows –

(a) Housing allowance being 20% of basic salary

(255,574.50 + 7,407.75 x 647,139.375)..... Kshs.182,024.325

(b).. Annual leave at the rate of 1.75 days for every completed month

1.75 x 5 = 8.75 days leave or pay in lieu of leave

(8.75 x 8 x 178.5)..... Kshs.1,561.875

(c) Medical attention bill..... Kshs.10,190

(d) Travel allowance Shs.800 x 5.25 months..... Kshs.4,200

(e) Underpayments..... Kshs.255,574.50

(f) Remuneration for days worked in July 2018 Kshs.7,407.75

(g) Remainder of contract Kshs.647,39.375

Kshs.1,108,097.825

Less sums paid as underpaid (158,600)

Total Kshs.945,296.95

He states that the constitutional basis of his claim are Articles 19(1) and (4), 20(3) and (4), Article 27(1) and (2) and 41(1) and (2). He further states that the statutory basis of his claim are the preamble to the Employment Act and Sections 3(6) and 41 of the said Act.

He avers that he was a member of the union and is entitled to the full benefits in the CBA. That the respondent has violated his rights by subjecting him to unreasonable working conditions and unfair remuneration.

He prays for judgment against the respondent as follows –

- (a) Kshs.949,497/825 unpaid terminal remuneration and benefits
- (b) Damages for violation of Petitioner's fundamental constitutional rights to fair remuneration and reasonable working conditions and unfair dismissal without due process.
- (c) Certificate of service.
- (d) Interest on (a) and (b) at court rates.
- (e) Costs of Suit.
- (f) Further or other relief within inherent jurisdiction of the Court.

In the submissions filed by the petitioner on 15th July 2019 he reiterates the averments in the petition.

The Respondent's Case

The respondent filed a replying affidavit of YUAN SHUXIN, a Director of the respondent who deposes that the petition is misconceived, ill-advised and misplaced and ought to be dismissed *in limine* for reasons that –

- a) A Petition for enforcement of fundamental rights in the Constitution of Kenya 2010 ought to be filed and brought under a proper forum for enforcement of rights as envisioned under Article 165(3)(b) of the Constitution of Kenya 2010 and not through the employment and Labour relations court.
- b) That the Notice of Motion Application and Petition as filed by the Petitioner are in flagrant contravention of the Employment and Labour Relations Court (Procedure) Rules 2016 and the Respondent herein shall file a preliminary objection at the appropriate time.
- c) That the Petition as filed are misconceived as the Respondent has not infringed on any of the Petitioner's rights as alleged. That the relief's sought by the Petitioner herein cannot issue as the same are brought on the basis of flagrant, malicious and unfounded claims with the aim at portraying the Respondent herein bad light.
- d) That the Petition as filed does not state what right the Petitioner alleges to have been breached by the Respondent and how the alleged breach has occurred.
- e) That the Petitioner's claim is speculative and based on unsubstantiated claims.
- f) That the Petition does not meet the threshold required to enable this Court to grant the reliefs sought.
- g) That the Petition and does not disclose adequate particulars in support of the alleged claim.
- h) That the Petition and is actuated by malice and falsehoods and such, the Petitioner is undeserving of the orders sought as he has approached the court of equity with unclean hands.
- i) That the Petition and is otherwise an abuse of court process and a waste of precious judicial time.

It is further deposed that the petitioner was engaged by the respondent as a Mechanic Grade 2 as he did not inform the respondent that he was a certified Grade 1 Mechanic and further that the vacancy available was for Grade 2 mechanic and the petitioner agreed to work in the said position.

It is deposed that the CBA formed an integral part of the petitioner's terms of engagement and a copy was supplied to him together with all other relevant policy documents applicable to him. That the petitioner signed in acknowledgment that he had read and understood the same, and is estopped from alleging lack of knowledge of the CBA.

It deposed that the petitioner last reported to work on 10th July 2019 and thereafter neglected, absconded and/or failed to report to work or to perform his duties as per contract. That he was at no time dismissed by the respondent as any such intention would have been communicated to the petitioner in writing in the manner provided in the CBA. That the respondent's Human Resources Manager made several calls to request the petitioner to report back to work to no avail. That the petitioner has even refused to report to work to sign worksheets to enable the respondent process his last pay. It is deposed that the petition herein is malicious, having been filed the same day the petitioner served a demand letter upon the respondent.

Mr. Shuxin deposes that the respondent has no problem supplying to the petitioner copies of payslips for the period he worked from February to 10th July 2018, that the hours worked by the petitioner are recorded in worksheets which were signed by him as is evident from copies annexed to the affidavit at annexure YS2. That the petitioner's contract clearly provides for his terms of service including monthly basic pay of Kshs.30,160, house allowance of 20% of basic pay and Kshs.800 transport allowance. That the petitioner was not paid daily or hourly salary as alleged.

It is deposed that the respondent complied with all statutory requirements in respect of the petitioner including the Employment Act.

The respondent also filed a replying affidavit of QI DONG, the respondent's Human Resource Manager, in which he reiterates the averments in the affidavit of Mr. Shuxin and denies the allegations of the petitioner. The respondent further filed affidavits of **Philip Ikandi Wanyama** and **Kevin Mokurumi Onuari** both mechanics who worked with the petitioner who also confirmed the depositions of Mr. Shuxin.

The respondent prays that the petition be dismissed.

In the respondent's submissions, it reiterates the averments in the replying affidavits and submits that there is no proof of dismissal of the petitioner and that he is not entitled to the reliefs sought.

Determination

I have considered the pleadings and submissions on record. The issues for determination are whether the petition as filed meets the threshold of a constitutional petition, and whether the petitioner is entitled to the reliefs sought.

I must from the outset express that I do not understand why the petitioner chose to file a petition. Other than mentioning certain constitutional provisions, he does not demonstrate the violation of any constitutional rights or how the facts of his claim relate to the constitutional provisions that he has relied on. Considering the prayers the claimant seeks, it is obvious that his claim relates to breach of an employment contract and has no relevance to violation of his constitutional rights.

In the case of **Harrikissoon v Attorney-General of Trinidad and Tobago [1980] A.C. 202** the court opined that –

“... The right to apply to High Court under Section 6 (our Section 23) of the Constitution for redress when any human right or freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures of invoking judicial control of administrative action. The mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the Applicant to invoke the jurisdiction of the court under the Section if it is apparent that the allegation is frivolous, vexatious or abuse of the process of court, as being solely for the purpose of avoiding the necessity of applying in the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

Judge Emukule (retired) who decided the above case further observed that the Indian courts have used strong language that constitutional jurisdiction should not be “**polluted**” with ordinary claims which can be litigated under the ordinary civil process of the court where oral evidence is given, and the veracity of witnesses is tested by cross-examination.

Whether the petitioner is entitled to the reliefs sought. On the merits of the petition, the petitioner alleges that his employment was terminated by the respondent verbally. The documents filed by the respondent and the affidavits of the petitioner's co-workers clearly show that he was not dismissed from employment. On the contrary, he is the one who absconded duty.

The petitioner further prayed for overtime and underpayments. The pay sheets clearly demonstrate that he was paid for all overtime work done. The pay sheets were signed by him before the salary including the overtime was processed.

On the issue of underpayment, the petitioner's contract of employment sets out his salary. There is no mention of his trade test certificate in his contract. He has not demonstrated that he brought the trade test certificate for Grade 1 to the attention of the respondent at the time of employment or that he had even raised the issue with the respondent. The salary he paid is in conformity with the CBA.

Further as submitted by the respondent, the vacancy available was for mechanic Grade 2. That is the job the petitioner applied for and accepted. The petitioner has not adduced evidence to prove that at the time of his engagement there was reference to his trade test certificate or agreement to pay him as a holder of trade test

grade 1.

He cannot now turnaround to claim that because he has superior qualifications his employer must create a vacancy for him commensurate with his qualifications.

Conclusion

I agree with the respondent that the petition is vexatious and an abuse of court process as there is nothing in the petition that could not have been claimed in a normal memorandum of claim.

The upshot is that I find no merit in the petition with the result that the same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF FEBRUARY 2020

MAUREEN ONYANGO

JUDGE