



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 75 OF 2019

IN THE MATTER OF ARTICLES 2, 3 (1), 10, 19, 20, 21, 22, 23(1) & (3), 27, 47(1), 49(2), 50(1),

50(2), 157(4), 159(2) (c), 159(2) (e) AND 258(1) OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF RULES 10, 11, 22, 23 AND 24 OF THE CONSTITUTION OF KENYA

(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)

PRACTICE AND PROCEDURE RULES, 2013

IN THE MATTER OF ALLEGED VIOLATION OF SECTIONS 6, 41(2)

AND 44(3) OF THE EMPLOYMENT ACT, 2007

IN THE MATTER OF CONSTITUTIONALITY AND LEGALITY OF THE IMPENDING

PROSECUTION OF THE PETITIONER, ONE JEREMIAH MWANGI NJOROGE

AS INSTIGATED BY MASTERWAYS SACCO SOCIETY LIMITED

IN THE MATTER OF ALLEGED VIOLATION OF SECTIONS 4, 6, AND 12

OF THE FAIR ADMINISTRATIVE ACTION ACT (NO.4 OF 2015)

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS

AND FREEDOMS UNDER ARTICLES 2, 3 (1), 10, 19, 20, 21, 22, 23(1) & (3), 27,

47(1), 49(2), 50(1), 50(2), 157(4), 159(2) (c), 159(2) (e) AND 258(1)

OF THE CONSTITUTION OF KENYA, 2010

- BETWEEN -

JEREMIAH MWANGI NJOROGE.....PETITIONER

- AND -

MASTERWAYS SACCO LIMITED.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

INSPECTOR GENERAL OF NATIONAL POLICE SERVICE....3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 13th March, 2020)

JUDGMENT

The petitioner filed the petition on 02.05.2019 through Salim Ali Mwadumbo of Mwadumbo & Company Advocates. The petitioner prayed for judgment against the respondents for:

- a) A declaration that the decision of the respondents to charge the petitioner with stealing by servant contrary to section 281 of the Penal Code, while conspicuously failing to charge one Tabitha Muthoni Kibanga alongside the Petitioner was malafides, irrational, unreasonable, illegal and an abuse of the discretion by the 2nd respondent under Article 157(6) of the Constitution, breached the petitioner's constitutional rights under the provisions of Articles 27(1), 27(4), 27(5), 35(1), 47(1), 50(2) (a) and 50(2) (j) of the Constitution of Kenya, and violated Article 157(11) of the Constitution, hence void for all intents and purposes.
- b) A declaration that the action of the respondents failing to avail to the petitioner in advance the evidence against him or afford him an opportunity to defend himself before the 1st respondent breached the petitioners' constitutional rights under the provisions of Articles 27(1), 27(4), 27(5), 35(1), 47(1), 50(2) of the Constitution of Kenya, and violated Articles 157(11) of the Constitution, hence void for all intents and purposes.
- c) Judicial Review by way of an order of certiorari to remove into the Court and quash the decision of the respondents, jointly and severally, to charge the petitioner with the offence of stealing by servant or any other offence pertaining to the 1st respondent's alleged missing funds.
- d) Any other or further remedy that the Honourable Court shall deem fit to grant.
- e) The respondents to bear the costs of the petition.

The petitioner's case is that at all material times he was employed by the 1st respondent. As a Sacco Officer. His initial appointment was in August 2011. On 03.04.2019 the petitioner was arrested by the police officers serving under the 3rd respondent on alleged charges of stealing by servant. The police officers informed the petitioner that the allegations were that the 1st respondent's funds in the sum of Kshs.4, 199, 933.00 had allegedly been channelled to his account since 2017. Further he was informed that the complaint had been made by the 1st respondent's chairman together with other board officials. He was further informed that he would be charged alongside another 1st respondent's officer one Tabitha Muthoni Kibanga since the 1st respondent's funds had also been found in her account. The petitioner has been locked out from his work place and he does not know his employment status as he has not been informed of a termination or suspension. The relationship between the petitioner and the 1st respondent's board members including the chairperson have become strained since they discovered that the petitioner was about to form his own Sacco society. In what the petitioner calls strange twist of events, his proposed co-accused Tabitha Muthoni Kibanga will now be a prosecution witness after she was given an opportunity to refund the missing funds but the petitioner has not been accorded similar opportunity. Further the petitioner urges that he has not been given an opportunity by the respondent to defend himself as envisaged in section 41 of the Employment Act, 2007. Further the prosecution is calculated to besmirch the claimant's name in the Sacco sector in circumstances that he was forming his own Sacco.

The petitioner alleges that by the lockout, the respondent has denied him access to information as protected under Article 35(1) (a) and 35(1) (b) of the Constitution. He alleges that his right to fair administrative action under Article 47(1) has been breached as well as the right to fair hearing under Article 50 of the Constitution. It is further alleged that his right under Article 27(1) (4) and (5) to equal protection and benefit of the law, freedom from discrimination on any ground including on the basis of his conscience, belief, ethnic, social origin and status has been contravened.

The 1st respondent opposed the petition by filing grounds of opposition on 15.05.2019 through Mwenda Kinyua & Company Advocates. The grounds are summed as follows:

- a) The petition raises no cause of action against the 1st respondent and the entire petition is incompetent in law.
- b) The petition does not raise any constitutional issue for determination by the Court.
- c) Orders sought are premature and an abuse of court process.
- d) The petition is defective in law.

The 1st respondent further filed on 19.07.2019 the replying affidavit of James Muchiri Kimori, the 1st respondent's Chairman. The affidavit shows that the 1st respondent received information about some suspicious cash transfers from the 1st respondent's account to the petitioner's account at the Co-operative bank of Kenya. Further information was that the claimant credited his account or other persons' accounts with member refunds which essentially was meant for the 1st respondent. The matter was reported to the police. An internal forensic audit was carried out. The petitioner has since been arraigned in Criminal Case No.807 of 2019 at Millimani Courts, Nairobi. It is the 2nd respondent who initiated and continued the prosecution as per Article 157 of the Constitution. The 1st respondent has conducted internal disciplinary process against the petitioner. The petition should therefore be dismissed.

The 2nd respondent filed grounds of opposition on 07.10.2019 through Njoki Kihara for the DPP. The grounds were as follows:

- a) The petition lacks clarity and precision in setting out the alleged directives in relation to the 2nd respondent.

- b) The petition discloses no cause of action against the 2nd respondent as the matter relates to the conduct of the 1st respondent. The orders sought are therefore not tenable as the 2nd respondent has not been shown to have a duty in the matter.
- c) Article 157 of the Constitution empowers the 2nd respondent to institute criminal proceedings only where a criminal offence is shown to have been committed.
- d) Section 24 of the National Police Service Act mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed.
- e) It is in the public interest that complaints made to the police are investigated and the perpetrators of crimes are charged and prosecuted.
- f) The petition is premature as investigations are still ongoing.
- g) The petition is premature and should be dismissed with costs to the 2nd respondent.

The petitioner, 1st respondent and the 2nd respondent filed their respective submissions. The Court has considered the material on record and makes findings as follows:

- a) As submitted for the 1st and 2nd respondent, the petitioner has not pleaded and provided evidence to establish the alleged contravention of rights and freedoms. The particulars of the violations have not been pleaded and proved at all.
- b) It was held by Majanja J in **Douglas Maina Mwangi –Versus- Kenya Revenue Authority and Another H.C. Constitutional Petition No.528 of 2013**, when dealing with the decision to prosecute the office of the DPP exercises independent judgment and the court cannot interfere unless it is shown that the exercise is contrary to the constitution, in bad faith or amounts to an abuse of process and the court found no reason to intervene in the decision nor was it the obligation of the Court to supervise the minutiae of investigation and prosecution. As submitted for the 1st and 2nd respondents, the Court follows the holding and upholds that under Article 157 the 2nd respondent is mandated to institute and undertake criminal proceedings against any person before any court other than a court martial in respect of any offence alleged to have been committed. Article 157(10) and section 6 of the Office of the Director of Public Prosecution Act provide that the 2nd respondent is free from control and direction of any person or authority in the commencement of criminal proceedings. It has not been shown that in exercising his discretion in the petitioner's case the 2nd respondent has contravened any constitutional provision. Thus the court finds that the remedies as prayed for are not justified.
- c) The petitioner laments that section 41 of the Employment Act, 2007 has not been availed to him. The 1st respondent's evidence that the internal disciplinary process has been concluded has not been rebutted by the petitioner. The Court holds that in any event the Act provides clear statutory remedies for an aggrieved party to a contract of service and which the petitioner is at liberty to invoke. Further the disciplinary process is clearly independent of the criminal process. Accordingly the petitioner has not established a constitutional violation in that regard.

In conclusion judgment is hereby entered for the 1st and 2nd respondents for dismissal of the petition with costs.

Signed, dated and delivered in court at **Nairobi** this **Friday 13th March, 2020**.

BYRAM ONGAYA

JUDGE