



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

PETITION NO 3 OF 2018

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHT TO HUMAN DIGNITY

AND FREEDOM AND SECURITY OF THE PERSON CONTRARY TO ARTICLES 25, 28,

29 AND 30 OF THE CONSTITUTION OF KENYA AND

IN THE MATTER OF ARTICLES 22(1), 25, 28, 29 AND 31 OF THE CONSTITUTION OF

KENYA AND RULE 4 AND 10 OF THE CONSTITUTION OF KENYA (PROTECTION OF

FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013 AND

IN THE MATTER OF ARTICLES 12 AND 29 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (1947)

AND

IN THE MATTER OF THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK

AND

IN THE MATTER OF THE LABOUR PRINCIPLES OF THE UNITED NATIONS GLOBAL

COMPACT

BETWEEN

KENNETH GONA KARISA.....PETITIONER

AND

TOP STEEL KENYA LIMITED.....RESPONDENT

JUDGMENT

1. By his Petition dated 10th April 2018 and filed in court on 25th April 2018, the Petitioner seeks several declaratory and compensatory remedies.
2. The Respondent's response to the Petition is contained in a Reply filed in court on 30th August 2018.
3. The Petition was canvassed by way of written submissions.

The Petition

4. The Petitioner states that he was employed by the Respondent Company as a Pusher Operator on 14th January 2017. He was placed on probation for 3 months but 1 month after signing the contract and before the lapse of the probation period, the Respondent gave him another contract of employment in the same position, to run from 1st March 2017 to 1st June 2017. He was to earn a monthly salary of Kshs. 26,000.

5. The Petitioner states that he worked diligently with no complaints and continued to work for the Respondent for 8 days after termination of his contract as he awaited renewal of contract as verbally communicated to him by the Respondent's Human Resource Manager.

6. The Petitioner maintains that by conduct of both parties, his contract of employment was deemed to have been renewed.

7. The Petitioner contends that his fundamental right to human dignity and security of the person as enshrined in Articles 28,29 and 31 of the Constitution of Kenya, Articles 5,12,23 and 30 of the Universal Declaration of Human Rights (1947) and the Labour Principles of the United Nations Global Compact have been breached as hereunder:

a) On or about 9th June 2017 at about 11.00 AM, the Petitioner was going about his duties when he was summoned by the Respondent's Human Resource Manager, John Mwalyo to his office where the Area Chief, Solomon Dalu and 2 Administration Police Officers.

b) John Mwalyo welcomed the Petitioner to his office and as the Petitioner sat down, Mwalyo stretched his hand and forcefully took a helmet from the Petitioner's head while informing him that his services were no

longer required as the Respondent was no longer interested in renewing the Petitioner's contract;

c) The Area Chief, Solomon Dalu and the 2 Administration Police Officers watched and stood guard as the Human Resource Manager continued to humiliate the Petitioner by ordering him to remove his overall and the gumboots he was wearing, claiming that they were the property of the Respondent;

d) The Petitioner refused to undress in front of the Human Resource Manager, the Chief and the 2 Administration Police Officers as he did not have clothing underneath the overall. He asked for time to go home, change and bring back the overall and gumboots but the Human Resource Manager and the Chief would have none of it. The Manager grabbed the Petitioner's overall and proceeded to unbutton it in an attempt to undress the Petitioner;

e) The overall and gumboots were forcefully taken from the Petitioner leaving him with nothing to cover his nakedness. The Petitioner was then given a certificate of service and a letter of non-renewal of contract.

8. The Petitioner avers that the acts of the Human Resource Manager have the following real and potential consequences:

a) Abuse of right to human dignity as envisioned under Article 28 of the

Constitution of Kenya;

b) Abuse of freedom and security of the person specifically the right not to be treated and punished in a cruel, inhumane or degrading manner as provided under Article 29(f) of the Constitution of Kenya;

c) Abuse of the right to privacy as envisioned under Article 31 of the Constitution of Kenya;

d) Failure to protect the fundamental rights and freedoms of the Petitioner as envisioned under Article 29 of the United Nations Universal Declaration of Human Rights;

e) Failure to protect the Petitioner's fundamental right to privacy as envisioned under Article 12 of the United Nations Universal Declaration of Human Rights and Principles 1 and 2 of the Labour Principles of the United Nations Global Compact;

f) Failure to protect the Petitioner's fundamental right against psychological torture as envisioned under Article 5 of the United Nations Universal Declaration of Human Rights.

9. The Petitioner pleads that John Mwalyo had no right whatsoever to harass or treat him in a cruel, inhumane or degrading manner by forcefully taking from him the helmet, overall and gumboots thus causing the Petitioner to walk barefoot in the factory considering that the Respondent manufactures steel and as such the premises have tiny metallic materials on the ground.

10. The Petitioner further pleads that he was not paid his dues for one week worked and was forced to walk home half naked like a mad man in the streets.

11. The Petitioner accuses the Respondent of failure to discharge its responsibilities on human rights by failing to support and respect the protection of internationally proclaimed human rights by ensuring that its operations are not complicit in human rights abuses as provided in the United Nations Guiding Principles on Business and Human Rights (2011).

12. The Petitioner prays for:

- a) A declaration that the Petitioner is entitled to the fundamental right to human dignity, freedom and security of the person, right to privacy, freedom from torture and cruel, inhumane or degrading treatment or punishment and right to protection against violation of human rights as provided under Articles 25, 28, 29 and 31 of the Constitution of Kenya, Articles 5, 12, 29 and 30 of the Universal Declaration of Human Rights (1947) and the Labour Principles of the United Nations Global Compact;
- b) A declaration that the forceful taking of the helmet and boots and the undressing of the Petitioner in the presence of the Chief and the 2 armed Administration Police Officers was illegal, unlawful and a violation of the fundamental rights and freedoms of the Petitioner;
- c) Compensation for breach of fundamental rights and freedoms;
- d) Salary for 8 days worked at Kshs. 8,000;
- e) Costs plus interest.

The Reply

13. In its Reply filed in court on 30th August 2018, the Respondent denies that the Petition falls under Article 22 of the Constitution of Kenya.
14. The Respondent admits that the Petitioner was employed as a Pusher Operator on 14th January 2017 and placed on probation until 14th April 2017. The Respondent states that the Petitioner's contract was renewed from 1st March 2017 to 1st June 2017 at a monthly salary of Kshs. 26,000.
15. The Respondent avers that prior to expiry of the Petitioner's contract on 1st June 2017, the Petitioner had started disrupting operations at the Plant and the management took time to deliberate on whether to renew the contract.
16. The Respondent states that the Petitioner's position as a Push Operator was a sensitive one at the Plant as no operations could be started without the Pusher being present to commence operations. The Petitioner, being aware that he was the lifeline/start key to the Plant, started disrupting operations.
17. The Respondent goes on to state that on 6th June 2017, the Petitioner organised an illegal strike wherein the Respondent realised at 8.00 am that the Plant was not running and upon inquiry it was discovered that the Petitioner had refused to start the push key of the Plant and he was not at his work station.
18. The Respondent's employee, John Mwalyo is said to have gone round the Plant On 6th June 2017 and found the Petitioner and the Inject Operator, one Mbarak Hamisi, beating the other employees so as to prevent them from entering the workplace and generally disrupting operations at the Plant.
19. On the same day, the Respondent's representative called all the employees to a meeting at which the Petitioner, as their spokesperson made certain demands namely; salary review, transport allowance, tea at 10.00 am, milk daily, executive chair for the Petitioner and longer contract.
20. The Respondent states that the employees returned work upon a promise that the Respondent's representative would consult the management and revert with proposals within the week.
21. The Respondent denies that the Petitioner was carrying on his duties when he was summoned by John Mwalyo to his office.
22. The Respondent further states that on 9th June 2017, the Petitioner again decided that no one would work until the demands made on 6th June 2017 were met and since there were two factions of employees with divided opinion on the matter, the Respondent convened another meeting.
23. The Respondent adds that the Petitioner wanted an immediate action on his demands which the Respondent could not meet. The two factions of employees started throwing stones and fighting among themselves.
24. The Respondent admits engaging the Police to assist in quelling the violence and the Area Chief, having heard the commotion, visited the Respondent's premises but found that the employees had managed to calm the situation. The Area Chief decided to remain on the premises to resolve the situation and 3 employees namely; Simon Kenda, Josiah Onyimi and Peter Orimba were interviewed to ascertain the problem.
25. The Respondent states that the 3 employees named the Petitioner as the instigator of the strike and refusal to work at the Plant. The Petitioner was called to the Respondent's office 3 times but he refused to avail himself.
26. The Petitioner eventually presented himself at the Respondent's office and upon being interviewed by the Area Chief and the Respondent's Human Resource Manager, he stated that no work would go on at the Plant until his demands were met. The Human Resource Manager then gave the Petitioner a letter of non-renewal of his contract which had expired on 1st June 2017.

27. The Respondent avers that the Petitioner was paid his final dues and was also issued with a certificate of service.

28. The Respondent adds that the Petitioner surrendered company property in his possession being overall, helmet and safety boots as per policy.

29. The Respondent denies that the Petitioner was undressed, stripped naked or had gumboots forcefully removed from him.

Determination

30. This being a constitutional petition, the first issue for determination is whether the threshold for such a pleading has been met.

31. The standard as to what constitutes a constitutional petition was set in the celebrated case of *Anarita Karimi Njeru v Republic (No 1) (1979) KLR 154* in the following terms:

“if a person is seeking redress...on a matter which involves a reference to the constitution it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”

32. This principle was echoed in *Mumo Matemu v Trusted Society of Human Rights Alliance [2014] eKLR* thus:

“.....the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court.....Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”

33. In his Petition, the Petitioner sets out a litany of events leading to his exit from the Respondent’s employment. He then cites several provisions of the Constitution of Kenya and some international instruments. The Petitioner however failed to frame the constitutional issues for determination by the Court.

34. As held in *International Centre for Policy and Conflict & 5 others v Attorney General & 5 others [2013] eKLR* the mere fact that the Constitution is invoked in pleadings does not elevate a case to a constitutional petition.

35. To my mind, the present petition is a straightforward employment dispute that ought to have been brought as an ordinary cause, complete with *viva voce* evidence. The parties appear to have been aware of this because in their written submissions, all they did was to ‘*testify from the Bar*’ by giving conflicting set of facts surrounding the Petitioner’s exit from the Respondent’s employment.

36. For the foregoing reasons, I find the Petitioner’s petition to be without merit and consequently dismiss it.

37. Each party will bear their own costs.

38. It is so ordered.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 7TH DAY OF MAY 2020

LINNET NDOLO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the

COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties electronically, with their consent. The parties have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

LINNET NDOLO

JUDGE

Appearance:

Miss Mboku for the Petitioner

Miss Okata for the Respondent