



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

AT NAKURU

PETITION NO.1 OF 2020

NELSON NYANGARESI BOSIRE.....PETITIONER

VERSUS

THE BOARD OF MANAGEMENT

SACRED HEART BOYS SECONDARY SCHOOL, RONGAI, NAKURU.....1ST RESPONDENT

THE KENYA NATIONAL UNION OF PRIVATE SCHOOL TEACHERS.....2ND RESPONDENT

NAKURU COUNTY LABOUR OFFICE..... 3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

JUDGEMENT

The petitioner filed the petition herein on 14th January, 2020. All the respondents were served and returns on service filed. The 3rd and 4th respondent entered appearance on 16th January, 2020 and responses on 6th February, 2020; the 1st respondent entered appearance on 22nd January, 2020 and response to the petition on 29th January, 2020; and the 2nd respondent responded to the petition on 4th March, 2020.

the parties attended court on 11th March, 2020 for hearing directions and agreed to address the petition by way of written submissions. Only the petitioner filed written submissions on 23rd April, 2020.

No respondent filed written submissions.

Reliefs sought.

The petitioner is seeking for orders that;

1. Declaration that the action of the 1st respondent to terminate the services of the petitioner without notice and for no justifiable reason was in contravention to the petitioner's right to fair labour practices as protected under article 41(1) & (2) of the constitution.
2. Declaration that the joint and several actions of the 1st, 2nd and 3rd respondents to lock the petitioner out of the meeting meant to discuss his terminal dues infringed on his right to fair administrative action as provided under article 47(1) & (2) of the constitution.
3. Declaration that the fact that the 1st, 2nd and 3rd respondents arrived at a decision adverse to the petitioner's interest after denying him audience was a violation of his right to access justice as protected under article 48 of the constitution.
4. Declaration that the act by the 1st, 2nd and 3rd respondents to deny the petitioner a chance to make his representation during the conciliation was an affront to the principles of natural justice on the right to be heard as well as contrary to the right to a fair hearing as provided for under article 50(1) of the constitution.
5. An order for exemplary damages for violations in 1, 2, 3, & 4 above.

6. An order against the 1st respondent for compensation for violation of fair labour practices equivalent to 12 months gross salary.

7. An order for re-calculation and payment of terminal dues based on the Minimum wage Order; Basic Conditions of Regulation of Wages (Protective Security Services) Order, 2007.

Petition.

The petition is that the petitioner is an adult male. The 1st respondent is a private boarding school for boys registered under the Ministry of Education. The 2nd respondent is a registered workers' union representing private school teachers and allied workers. The 3rd respondent is a government organ under the Ministry of labour & Social Protection. The 4th respondent is the chief legal advisor to the government.

The petitioner was employed as a night guard at the 1st respondent on 4th aril, 2018 earning ksh.8,000 per month. He worked until 2nd April, 2029 when the 1st respondent's principal arbitrarily dismissed him from his employment.

On 2nd April, 2019 the petitioner was given 8 days off and his 3rd day he got a call from the 1st respondent's principal Mr Ronald Ondieki summoning to report back and when he was verbally informed that his services were no longer required and should hand over his duties. No reasons were given.

On 5th August, 2019 the petitioner wrote to the 2nd respondent on the matter and who wrote to the 3rd respondent with are commendation that terminal dues be paid at Ksh.148,672.05 and whereupon a conciliator was appointed, Margaret Obegi. The parties were invited for conciliation on 14th or 30th august, 2019 and the 1st respondent attended on 20th September, 2019 and the issue of unfair termination of employment was settled but when the issue on the due terminal dues arose the petitioner was sent out to wait for the outcome and when he was called back he was informed of the decision that he should be paid Ksh.45,012. He registered protests on the meagre payment but was not given audience. The 2nd and 3rd respondents who were supposed to protect his interests failed to do so.

On 24th September, 2019 the petitioner was issued with a cheque of ksh.45,000 only delivered to the 3rd respondent and he collected the same from the 2nd respondent.

The petition is that there was a violation of article 41(, 47, 48 and 50 of the constitution on the grounds that the petitioner was not accorded fair labour practices; he was denied the right to fair administrative action; he was denied the right to access justice; and there was no hearing.

The petition is also that the petitioner suffered injury following the violation of his rights when he was unfairly dismissed from his employment; for being locked out of the meeting discussing his terminal benefits; an adverse decision being taken against him; and denial of the right to be heard when he was not allowed to adverse his case and payment of the due terminal dues.

The petition is supported by the Supporting Affidavit and the Supplementary Affidavits of the petitioner and on the grounds that he did not commit gross misconduct or insubordination against the 1st respondent as alleged and if so there were no disciplinary proceedings undertaken against him save that there was a fracas at the gate when one of the priests arrived at the school drunk and started companioning as to why he had been locked out and did not want to go through security checks. His employment was then terminated without due process, he was not involved in the reconciliation process before the 3rd respondent and the terminal dues paid were not in full.

The petitioner's case is also that the 3rd and 4th respondents denied him his right to fair administrative action by failing to involve him in the conciliation meeting as invited vide letter dated 19th June, 2019. Despite attending the parties proposals where he was asking for Ksh.148,672.05 he was then sent out only to be informed that the dispute had been settled with payment of Ksh.45,000 only. The 3rd respondent abdicated its duty of ensuring fair labour practices, fair hearing and access to justice and when the petitioner protested to the nature of proceedings, these were not put on the record.

1st respondent

The 1st respondent response is that the petitioner was an employee but was involved in gross misconduct despite several warnings. He was summoned to show cause why his employment should not be terminated after fighting with a priest, refusing to open the gate for his employers and for being rude and arrogant which was insubordination and to which he failed to show good cause.

The response is also that the petitioner's employment was terminated after a fair hearing and upon discussions with his union his claims were settled in full. the dues were settled and calculated in the presence of the petitioners trade union and he is stopped from claiming for any other payments. The reliefs made are without merit and should be dismissed with costs.

The petitioner had claimed for Ksh.50,387.60 and upon proper calculations it came to ksh.45,012 which was paid in full and acknowledged.

2nd respondent

The 2nd respondent's response is that there is a collective bargaining agreement (CBA) between the 1st and 2nd respondents. There were two trade disputes between the 1st and 2nd respondents set for hearing by the 3rd respondent on 30th September, 2029 and which could not be heard and 3rd respondent asked the parties to consent to on which to start with the petitioner's case being second was asked to go out on good faith. The petitioner's case was then heard in the presence of the 2nd respondent as the legal representative.

The response is also that the petitioner has not come to court with clean hands as he has been fully compensated and which he acknowledged in full. there is no cause of action against the 2nd respondent and no rights have been infringed and the petition should be dismissed.

3rd and 4th respondents

the 3rd and 4th respondents response is that the 3rd respondent was never appointed as conciliator between any dispute involving the 1st and 2nd respondents as alleged and if at all there was conciliation there was adherence to the laid down procedures in the conciliation process and the law regarding to the same. Any acts by the labour officer were geared towards reaching an amicable resolution of the dispute and the 3rd and 4th respondents are strangers to the details of the terminal dues paid.

The response is also that the petiole had not worked for more than 12 months to deserve the terminal dues claimed and the petition should be dismissed with costs.

The petitioner as noted above filed written submissions. The written submissions reintegrate the facts set out in the petition.

On the petitioner and the responses thereof, the issues which emerge for determination are;

Whether there are constitutional violations;

Whether the remedies sought should issue;

Who should pay costs.

Before delving into the issues set out above, the court notes that the petitioner opted to move the court by way of petition. Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016 allow a party claiming rights in employment and labour relations and for connected purposes to move the court by filing a Memorandum of Claim citing the rights violated under the Constitution, 2010 or the law. Constitutional rights violations can also be urged by filing a memorandum of claim.

In this regard, the Court of Appeal in addressing the manner of moving the court in the case of **Maurice Adongo Anyango versus Kenyatta International Convention Centre [2018] eKLR** held that;

In so far as the appellant's claim was employment claim governed by the Employment Act, the court best suited to interpret the provisions thereof was the Employment & Labour Relations Court in a claim instituted in the normal manner as opposed to judicial review proceedings [or a petition]. This is especially since the appellant was also seeking other reliefs such as salary arrears which transcend the reliefs available in judicial review proceedings [or in a petition claiming constitutional rights violations]. Whether the circumstances in a case allow reinstatement would also be best determined by the same court taking into account the provisions of the Employment Act, viva voce evidence to test the veracity of competing claims as opposed to affidavit evidence which is synonymous or associated with judicial review proceedings. ... In determining the salary arrears and whether the circumstances in this case would allow ... the reasons and circumstances leading to the appellant's termination would need to be interrogated. As rightly found by the Judge, salary arrears are in the nature of special damages requiring to be specifically proved where they have been pleaded. Allowing the appellant's claim as it is would be to muddy the waters and further cause uncertainty in the law.

The Court of Appeal in n **Judicial Service Commission versus Gladys Boss Shollei & Another [2014] eKLR**, also held that the respondent had initiated her case following the termination of employment by way of a petition at the High Court and Court seeking enforcement of her fundamental rights and freedoms, compensation and damages but such claims ought to have been initiated by way of a

claim before the court.

Similarly in this case, the same potion obtains. The petitioner ought to have filed a Memorandum of Claim which would have allowed for articulation of his employment and labour relations claims and which includes the payment of his terminal dues and which would have allowed for call of evidence for interrogation unlike a petition.

Going back to the issues set out above, the petition is that the petitioner was the employee of the 1st respondent who terminated his employment and which matter was settled through conciliation by the 3rd respondent and where the petitioner as represented by the 2nd respondent his trade union but his terminal dues were not properly tabulated and contests the payment of ksh.45,000 instead of Ksh.148,672.05.

The defence is commonly that the matter was resolved following conciliation and terminal dues agreed and which have since been paid in full settlement and acknowledged by the petitioner.

The petitioner was an employee of the 1st respondent and unionised under the 2nd respondent. the 1st and 2nd respondents had a CBA regulating employment. Under the provisions of the Labour Relations Act, 2007 the 2nd respondent became the legal representative of the petitioner with regard to his employment with the 1st respondent.

Following a dispute between the petitioner and the 1st respondent, the same was resolved through conciliation by the office of the 3rd respondent , the office mandated to undertake such process under the Labour Relations Act, 2007 pursuant to section sections 62, 67 and 69 read together with the Employment Act, 2007 and the Labour Institutions Act, 2007. Upon a trade union reporting a dispute with regard to its member, the labour officer is mandated to constitute conciliation process between the employer and the trade union as the representative of the employee and its member and where there is no amicable resolution the labour officer issues a *Certificate of Unresolved Dispute* to allow the trade union file suit with the court. See **Kenya Engineering Workers Union versus Auto Fine Filters And Seals Limited [2019] eKLR.** in the case of **Kenya Electrical Trades & Allied Workers Union versus Kenya Power & Lighting Company Ltd [2015] eKLR** the court held that;

... where a trade dispute is not resolved within the timelines set out in the Labour Relations Act, there are two avenues or possibilities, the conciliator should issue a certificate that the dispute remains unresolved {section 69(a) of the Labour Relations Act, 2007} to enable the parties to move to Court. No certificate from the conciliator has been exhibited in the instant case.

Where a certificate is not issued, a party suing is required to swear an affidavit stating the failure. Such affidavit should have accompanied the draft Memorandum of Claim. No such affidavit has been exhibited.

As noted above, by the petitioner filing the instant petition, such does not cure the statutory requirements as set out above.

The rationale is that the Labour Officer was moved by his trade union, the 2nd respondent and the matter with regard to the payment of terminal dues was resolved and settlement with a payment. The trade union as the legal representative of the petitioner and by virtue of the CBA between the 1st and 2nd respondent had the requisite capacity to settle the matter for and on behalf of the petitioner as its member as this was the very purpose of his unionisation under the 2nd respondent.

What is important to note is that pursuant to the provisions of section 15 of the Employment and Labour Relations Court Act, 2011 the court can refer the case back to conciliation or mediation at any stage if it becomes apparent that the dispute ought to have been referred to mediation or conciliation. The fact of the petitioner's legal representative and his trade union of choice having resolved the dispute and a settlement sum paid to him, then by filing the instant petition is to ignore the process and procedures already put into motion and where the matter was resolved for and on his behalf.

The union, 2nd claimant entered into an agreement with the employer, the 1st respondent upon conciliation through the 3rd respondent. An agreement and payment were achieved. The matter for the petitioner was marked as settled by his union. The 1st respondent left the negotiations table aware of a settlement and paid the dues owing to its former employee.

The petitioner has confirmed that he has since been paid ksh.45,000.

On the admission of unionisation, and a settlement achieved between such union and the employer, the 1st, 3rd and 4th respondents cannot be

faulted for allegedly failing to pay the petitioner his terminal dues. Such dues were settled amicably with his union.

Where the union failed to act in the best interests of the petitioner such are matters not for the 1st, 3rd and 4th respondents to deal as held in the case of **Seth Panyako versus Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers [2013] eKLR;**

Once a Trade Union is registered, it acquires among other capacities, the capacity to sue and be sued in its own name. It attains the status of a quasi-corporation, capable of suing for wrongs done to itself and being sued for breaches of the contract of Membership, subject to statutory limitations. The position that Trade Unions are associations of employees, and it would not be possible for employees to sue themselves as an association, no longer holds sway in modern trade union law. Members have contract or mandate with their Trade Unions, and Trade Unions can be held liable if they breach it. KUDHEIHA had an obligation under its constitution to act honestly and diligently in managing the Claimant's trade dispute. There is sufficient evidence that the Respondent committed breach of its mandate. When the Constitution of Kenya, the Labour Relations Act and the Internal Constitution of KUDHEIHA grant the mandate to recruit Members, there is a reciprocal obligation to act honestly and fairly, in representing recruited Members. When a Trade Union recruits Members and is granted organizational rights by the law, there is created a fiduciary duty to protect Members' rights, act diligently and in good faith. Trade Unions must learn that they are as much accountable to their Members who are paying them monthly subscription fees, in much the same way Lawyers who are paid legal fees to represent their Clients are accountable. Trade Union Dues and agency fees are not paid to merely increase the material wealth of Trade Union Nabobs; they are paid to ensure Members are effectively represented at the various Industrial Relations Platforms. [Underline added]

The matter(s) between the petitioner and the 1st respondent on his terminal dues having been settled through agreement between the employer the trade union, the 2nd respondent, the Petitioner cannot revive the dispute as herein addressed. The Petitioner having reported the matter to his union and the settlement undertaken on his behalf, to file the petition herein is in abuse of court process.

The representation of the petitioner by his trade union in negotiating a settlement with the employer is therefore lawful and valid. There is no matter demonstrated for the court to interfere with the same. In this case, I find no justifiable cause to interfere with the settlement of the terminal dues as negotiated between the 1st and 2nd respondents being the employer and trade union for and on behalf of the petitioner.

The petitioner fails. The petitioner ought to pay costs due to the respondents save they only attended herein and filed responses and nothing. costs shall be paid at 25% only.

Accordingly, the petition is herein found without merit and is hereby dismissed. Respondents awarded 25% of costs.

Dated and delivered electronically this 4th June, 2020 at 0900 hours

M. MBARU

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 the Order herein shall be delivered to the parties via emails. this 4th June, 2020 at 0900 hours

M. MBARU

JUDGE