



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 32 OF 2020

IN THE MATTER OF VIOLATION OF ARTICLES 10, 20, 21, 22, 23, 25, 27, 28, 29, 41, 47, 50, 73, 232, 234, 236 & 258 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE PUBLIC SERVICE COMMISSION ACT AND ITS REGULATIONS AND HUMAN RESOURCE MANUALS AND EMPLOYMENT ACT

IN THE MATTER OF WITHHOLDING OF SALARY FOR 10 YEARS IN SPITE OF BEING ON DUTY UPON LAWFUL DEPLOYMENT

-BETWEEN-

DR. DAVID KAMAU NDEGE.....PETITIONER

- VERSUS -

PRINCIPAL SECRETARY, MINISTRY OF HEALTH.....1ST RESPONDENT

MINISTRY OF HEALTH.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

-AND-

THE PUBLIC SERVICE COMMISSION.....1ST INTERESTED PARTY

NATIONAL QUALITY CONTROL LABORATORY.....2ND INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 23rd October, 2020)

JUDGMENT

The petitioner filed the petition on 27.02.2020 through Masika & Koross. The petitioner prayed for:

a. A declaration that the petitioner is entitled as against the respondents and all persons the protection of his fundamental rights and freedoms enshrined in the Bill of Rights which applies to all and binds all state organs including but not limited to fair labour practices; the right not to be subjected to torture in any manner, whether physical or psychological or treated or punished in a cruel, inhuman, or degrading manner and the respondents are under a duty to observe the provisions enshrined in Articles 10, 73 and 232 of the Constitution with regard to the contract with the petitioner.

b. A declaration that the various decisions of the respondents and their agents of show-cause, transfer and allegation of desertion of duty and stoppage of petitioner’s salary contained in the letters Ref. No. 19891267861/138 dated 05.09.2018, Ref. No. MMS/ADM/16 VOL.II (20) dated 27.01.2010 and Ref. No. 1989126786/4 dated 14.06.2010 were in contravention of the Constitution and the same are null and void *ab initio*.

c. Consequently, an order of certiorari to remove to the Honourable Court and quash the various decisions of the respondents and their agents of show-cause, transfer and allegation of desertion of duty and stoppage of petitioner’s salary contained in the letters

Ref. No. 19891267861/138 dated 05.09.2018, Ref. No. MMS/ADM/16 VOL.II (20) dated 27.01.2010 and Ref. No. 1989126786/4 dated 14.06.2010

d. A declaration that the specific parts (i) and (ii) and warning decisions contained in the respondent's letter Ref. No. 1989126786/127 dated 13.08.2015 were in contravention of the Constitution and the same are null and void *ab initio*.

e. Consequently, an order of certiorari to remove to the Honourable Court and quash the specific parts (i) and (ii) and warning decisions contained in the respondent's letter Ref. No. 1989126786/127 dated 13.08.2015.

f. Consequently, an order of mandamus compelling the 1st and 2nd respondents to with immediate effect pay the petitioner, in arrears and with interest, his salary since 2010 as a Pharmacist in Job Group Q stationed at the 2nd interested party, when it was stopped and henceforth continue paying his monthly salary as he continues with discharge of his duties.

g. An order to be issued for compensation by the 1st and 2nd respondents to the petitioner for an amount or sum to be determined by the Court for contravention of the petitioner's fundamental rights and freedoms and failure to observe the National values and principles of Kenya as well as principles of public service enshrined in the Constitution thus injuring and subjecting the petitioner to physical and psychological torture, cruelty, inhuman or degrading treatment and punishment and indeed servitude and indignity and exposing him to public ridicule and odium and possible prejudice as regards future national service in view of the requirements of Chapter 6 of the Constitution and occasioning him losses and damages.

h. The costs consequent upon the petition be borne by the respondents in any event.

i. Any such other order as the Honourable Court shall deem just and fair.

The petition was based on the annexed petitioner's affidavit and the petitioner's supplementary and further affidavit sworn on 28.07.2020.

The respondents and the 1st interested party filed the replying affidavit of Susan Mochache sworn on 20.07.2020 through the learned Principal Litigation Counsel Beatrice Akuno, for Attorney General.

The 2nd interested party filed the replying affidavit of its Director, Dr. Hezekiah K. Chepkwony sworn on 27.07.2020.

Parties, except the 2nd interested party, filed their respective final submissions.

The Court has considered the affidavits. The facts are as follows as far as the Court can make them out from the affidavits on record.

The petitioner was employed by the Ministry of Health as a Pharmacist Job Group K effective 06.10.1989 and rose through the ranks to the position of Deputy Chief Pharmacist Job Group Q effective 01.07.2001. By the letter dated 27.01.2010 he was transferred to Kerugoya District Hospital and he reported on 10.03.2010. Thereafter he absented himself from duty and his salary was stopped effective 06.05.2010. A show-cause letter ref no. 1989126786/4 dated 14.06.2010 issued. The petitioner replied by the letter dated 10.08.2010 that he had not absented himself but that he was working with ADB Project after the Permanent Secretary Ministry of Public Health and Sanitation to remain in Afya House pending further instructions. The respondent's case is that the transfer had never been rescinded. The petitioner was placed on suspension by the letter ref. no. 1989126786/118 dated 27.03.2012. The ministerial human resource advisory committee deliberated the case and recommended to the Permanent Secretary that the petitioner be dismissed from service effective 10.03.2010 subject to approval by the 1st interested party. By the letter ref.no. PSC/D/ND/412 dated 29.10.2013 the 1st interested party decided that the petitioner be dismissed from service effective 10.03.2012 on account of desertion of duty and be issued with a warning letter for claiming that he was appointed to head the Division of Commodities for logistics Management in the Ministry of Public Health and Sanitation and yet his official Ministry was the Ministry of Medical Services. Later, the 1st interested party by the letter ref. no. PSC/D/ND/412(5) dated 21.07.2015 varied its earlier decision to dismiss the officer and directed that the officer be warned for leaving the Ministry of Medical Services without being released. The Ministry conveyed the decision by the letter ref. no. 1989126786/127 dated 13.08.2015 to the officer requesting him to report to the Director of Medical Services for deployment. The petitioner acknowledged the letter 14 months later on 24.11.2016. His explanation is that he had not received the correspondence until a good Samaritan informed him about the 1st interested party's decision that he be deployed. The Ministry deliberated the case and issued a letter to show-cause ref. No. 1989126786/138 dated 05.09.2018. It was alleged that he failed to report to the 2nd interested party on 13.08.2015 as deployed and he was to show why he should not be dismissed on account of desertion of duty.

It is stated for the respondents and the 1st interested party that from 23.11.2016 when he received the letter conveying the 1st interested party's decision of reinstatement to 20.03.2018 when he reported for duty, the petitioner's whereabouts remained unknown. Further, the petition should therefore fail as frivolous, vexatious and an abuse of Court process. The procedure adopted against the respondent was fair and not biased so that the Court should not intervene. Further, the employer should be allowed to carry out the disciplinary process and avail its findings.

The replying affidavit filed for 2nd interested party confirms as follows. The petitioner was deployed to the 2nd interested party by the letter ref.no. 1989126786 dated 15.03.2018 and he reported on 20.03.2018. Thereafter, the petitioner reported that he was not receiving his salary yet he was working as deployed. Later he received a letter to show-cause ref. no.19891267861/138 dated 25.09.2018 to the effect that he had failed to report to the 2nd interested party upon deployment on 13.08.2015. However, there exists no such letter deploying the petitioner as alleged and dated 13.08.2015 – as no such letter has been exhibited.

The petitioner urges that there is no evidence of a copy of the letter deploying him to the 2nd interested party on 13.08.2015 being the basis of

the 2nd fictitious disciplinary letter ref.no.19891267861/138 dated 05.09.2018.

The Court has considered the material on record and makes findings as follows:

1. The respondents have failed to show that the petitioner was deployed to the 2nd interested party on 13.08.2015. Thus the Court finds that the 2nd disciplinary letter ref.no.19891267861/138 dated 05.09.2018 is oppressive and in violation of the petitioner's rights and freedoms and the relevant constitutional provisions as claimed and prayed for the petitioner.
2. The matters flowing from the initial show-cause letter ref no. 1989126786/4 dated 14.06.2010 were concluded by the 1st interested party's decision ref. no. PSC/D/ND/412(5) dated 21.07.2015 rejecting the Ministry's recommendation that the petitioner be dismissed and confirming that he had been working but in a different Ministry from his and that "**the mix is regretted**". The petitioner did not challenge that decision and the Court returns that it will not go back to that decision. What is important is that the petitioner had been working and the 1st interested party's decision was not that the petitioner's salaries and other benefits be withheld or not paid in that regard. The 1st interested party's decision was that he had been working though in a different Ministry and the mix up was not attributed to the petitioner (as he had been deployed by the letter dated 12.02.2009 by one Mark Bor, Permanent Secretary, Ministry of Public Health and Sanitation). The Court finds that in absence of any other justification, the petitioner's rights have been violated and threatened as prayed for and the petitioner is entitled to pay as prayed for.
3. As the petitioner has been awarded all withheld salaries, the Court considers that to be sufficient remedy and the petitioner is not entitled to further compensation for breach of rights and freedoms as the contract of service has been given effect to, fully.
4. The petitioner has substantially succeeded and is awarded costs of the petition.

In conclusion, judgment is hereby entered for the petitioner against the respondents for:

- a. The declaration that the petitioner is entitled as against the respondents and all persons the protection of his fundamental rights and freedoms enshrined in the Bill of Rights which applies to all and binds all state organs including but not limited to fair labour practices; the right not to be subjected to torture in any manner, whether physical or psychological or treated or punished in a cruel, inhuman, or degrading manner and the respondents are under a duty to observe the provisions enshrined in Articles 10, 73 and 232 of the Constitution with regard to the contract with the petitioner.
- b. The declaration that the decision of the respondents and their agents of show-cause, contained in the letter Ref. No. 19891267861/138 dated 05.09.2018 and all consequential processes was in contravention of the Constitution and the same are null and void *ab initio*.
- c. An order of certiorari hereby issued to quash the decision of the respondents and their agents of show-cause, contained in the letter Ref. No. 19891267861/138 dated 05.09.2018 together with all consequential processes thereof.
- d. The order of mandamus compelling the 1st and 2nd respondents to with immediate effect pay the petitioner, in arrears, his salary since 2010 as a Pharmacist in Job Group Q currently stationed at the 2nd interested party, from when it was stopped and henceforth continue paying his monthly salary as he continues with discharge of his duties; and to pay all the withheld pay as at the date of this judgment, by 31.12.2020, failing interest to accrue thereon at Court rates from the date of this judgment till full payment. (and the payment being less PAYE at the rate prevailing as at the date of this judgment)
- e. The respondents to pay the petitioner's costs of the petition.

Signed, dated and delivered by the court at **Nairobi** by video-link this **Friday 23rd October, 2020**.

BYRAM ONGAYA

JUDGE