



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 151 OF 2016

(Before Hon. Justice Hellen S. Wasilwa 11th November, 2020)

IN THE MATTER OF THE CONTRAVENTION OF ARTICLE 41 (1) OF THE CONSTITUTION OF KENYA

BETWEEN

DAVID WAMWIRI.....CLAIMANT

VERSUS

BATA SHOE COMPANY KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Petitioner worked as a Branch Manager between August 2009 and December 2013 in one of the Respondent's shops located in Machakos.
2. The Petitioner avers that in 2011, while he was working as an assistant manager at the Nakumatt Mega branch, the District Sales Manager asked him to bring his Continuous Assessment Test papers for the Petitioner to work on in exchange for special favours at work. The Petitioner declined and the District Sales Manager relocated him to Malindi in 2012.
3. He later served in Mombasa. However, in 2013 he was relocated back to Nairobi at the Tom Mboya branch, when the Mombasa Branch was closed. He found Mr. Gathuo, the District Sales Manager who continued to target him thus creating a hostile working environment for him. The Petitioner avers that at one point, Mr. Gathuo told him that he would personally ensure that the Petitioner was taken to a place where he wouldn't be recognized for his achievements.
4. Finally, in that same year, the Petitioner was transferred to Machakos to serve as the manager. The Petitioner avers that Mr. Gathuo worked with some of the employees at the Machakos Branch to sabotage him so that his employment would be terminated. For instance, Mr. Gathuo allocated the Petitioner's shoe receiving day to Thursday which was known to be the managers' day off.
5. As such, the Petitioner was forced to delegate this duty to the cashier. However, whenever the shoes were received by the cashier, there would be a shortage. Mr. Gathuo was alerted but nothing was done. The shortages persisted until they accumulated to Kshs. 450,000.00. Mr. Gathuo was notified of the same but still nothing was done.
6. As a result of the shortage, the Petitioner was forced to take a loan of Kshs. 290,000.00 from Kiatu Sacco, so as to clear the shortage. It is the Petitioner's case that he was subjected to punitive interest rates from the bank for something he did not do.
7. The Petitioner avers that Mr. Gathuo took his academic certificates to hinder him from getting work elsewhere. The Petitioner further avers that he was directed to pick his certificates from the Respondent's offices at Limuru but was never issued with the same despite visiting the offices on several occasions to collect them.
8. He was later informed by the Human Resource Manager that the certificates had been handed over to the Machakos Police Station. However, he was informed by the police that no certificates had been taken there by the Respondent or its employees. According to the Petitioner, this was done by the Respondent and its employees to ensure that he resigned from his employment. As such, he involuntarily resigned from his position on 26/11/2013 and explained to the HR Manager that his resignation was prompted by the frustration he experienced from the workplace.
9. The Petitioner avers that since leaving the Respondent's employ, he has missed out on various employment opportunities because of not having his original certificates. He avers that in its response to his demand letter, the Respondent denied having possession of his certificates.

10. It is the Petitioner's position that the frustration he experienced at work and the loss of his certificates amounted to an infringement of his right under Article 41 (1) of the Constitution and seeks the following remedies:-

- a. A declaration that the seizure of the Petitioner's original certificates is unlawful, oppressive, unwarranted and unjustified.*
- b. A declaration that the Respondent has engaged in unfair labour practices.*
- c. Compensation for the unfair labour practices.*
- d. A mandatory order compelling the Respondent to return to the Petitioner his original certificates.*
- e. An order for compensation to the Petitioner for the emotional and psychological torture occasioned upon him and for the lost opportunities.*
- f. An award of compensation for infringement of the Petitioner's constitutional rights.*
- g. Any other orders that this Honourable Court shall deem fit.*
- h. Costs be borne by the Respondent.*

11. The Respondent has opposed the Petition through the Replying Affidavit of Ibrahim Mdoo Mghanga sworn on 12/9/2017, the Replying Affidavit of Kenneth Amdany sworn on 12/6/2017, the Further Affidavit of Gabriel Gathuo Mwaura sworn on 12/6/2017 and the Further Affidavit of Peter Giathi sworn on 10/1/2017.

12. Ibrahim Mghanga, the 1st Affiant, avers that he served as a cashier at the Machakos One Store where the Petitioner had been the Branch Manager while Mr. Gathuo was the District Sales Manager.

13. He averred that on 27th November 2013, he saw the Petitioner packing Toughees shoes into a variety of sacks yet he had made no entries into the system. He enquired from the Petitioner where he was taking the shoes, to which he replied that he was taking them to a customer in Wote.

14. It is the 1st Affiant's position that the shoes had been packed yet they hadn't been paid for, which was a breach of the Company's policy. He informed Mr. Gathuo of the occurrences. The Petitioner later returned and the 1st Affiant left for lunch. While on his lunch break, he received a call from the Petitioner informing him that he had been feeling unwell and had gone to seek medical attention. However, when he came back from his lunch break, he was informed by the shop assistant that the Petitioner had left with other shoes.

15. He averred that internal auditors took the day's stock that very day and the Petitioner's original certificates were found by the internal auditors who informed Mr. Gathuo of the same. It was his case that the audit revealed cash losses and stated that the Petitioner never came back to work.

16. The 1st Affiant denied leaving the store with Mr. Gathuo in November 2013.

17. Kenneth Amdany, 2nd Affiant, avers that he is in charge of the audit section of the Respondent's company. He avers that sometime in 2013, the Petitioner declared a loss of Kshs. 156,608.00 at the Machakos One Store. As such, Robert Langat was dispatched to take over the management of the store.

18. It is his case that on 27/11/2013, he was informed that the Petitioner had packed shoes into bags yet no payments had been received. As such, it was resolved that an internal audit would be conducted. The audit was conducted on the same day and concluded on 28/11/2013. It was discovered that the Respondent had suffered a financial loss of Kshs.1,319,372.00 from a loss of 1620 assorted pairs of shoes and Kshs. 77,940.00 on account of shortfall in cash in the weeks prior to the Petitioner's resignation.

19. It was the 1st Affiant's case that the Petitioner was in charge at the time the losses were incurred. It is his position that the Petitioner tendered his resignation effective 26/11/2013 vide, the letter received by the Respondent on 2/12/2013.

20. He confirmed that the internal auditors gave Mr. Gathuo the Petitioner's original certificates and other personal documents belonging to the Petitioner.

21. The 2nd Affiant denies receiving a report of shortages of Kshs. 450,000.00 from the Petitioner as alleged. He contends that the Petitioner reported a stock loss of Kshs. 153,608.00 compared to the actual loss of Kshs. 1,319,372.00 in stock and Kshs. 77,940.00 in cash. He denies the allegation that the Petitioner paid to the Respondent Kshs. 290,000.00.

22. It is his position that the Petitioner was negligent in leaving his original certificates at the Respondent's premises and failing to ascertain the whereabouts. He denied the allegation that the Petitioner's certificates were withheld from him. It is his contention that the Petitioner resigned to avoid disciplinary proceedings and avers that the Petitioner has misled this Court and seeks to benefit from his own negligence. He urged this Court to dismiss the Petition.

23. Gabriel Gathuo Mwaura, 3rd Affiant, reiterated some of the 2nd and 3rd Affiant's averments. He confirmed that on 27/11/2013, he received a phone call from Ibrahim informing that the Petitioner was requesting staff to pack shoes in gunny bags yet no payments had been made which resulted into an internal audit. When he arrived, the Petitioner had already left with the shoes.
24. He confirmed that the internal auditors had handed him the Petitioner's original certificates and other documents which he listed in his affidavit. He called the Petitioner for an explanation on the losses and to inform him that he had left his original certificates but he never responded. The loss was reported to the police and the audit documents as well as the original documents were left in police custody. In his view, it was the Petitioner's sole responsibility to retrieve his original certificates.
25. He denied requesting the Petitioner to assist him with his assignments. He denied maliciously sanctioning the Petitioner's transfer and contended that transfer of store managers was a normal company policy. He denies seeking any original copies from the Petitioner and contends that copies were sufficient for updating employee records.
26. He also denied receiving any report of the shortages of Kshs. 450,000.00 neither had the Petitioner paid any monies to offset the amount. It was his testimony that the Petitioner only reported a shortage of Kshs. 153,608.00 which triggered the audit of 27/11/2013.
27. He denied there being a violation of the Petitioner's right to fair labour practice and urged this Court to dismiss the Petition.
28. Peter Giathi, the 4th Affiant, avers that he is the Respondent's HR Manager. He avers that he unsuccessfully tried reaching the Petitioner vide telephone since he had left his work station without authorization.
29. He further avers that on 2/12/2013, he received the Petitioner's letter of resignation dated 26/11/2013 to which he responded to. He views the resignation as an act of bad faith with the intention of evading the responsibility emanating from the losses incurred at the Machakos One Store.
30. He contends that in 2015 he received a demand for original certificates to which he responded in the negative and advised him to collect them from the Machakos Police Station. He avers that when he wrote the response, he honestly understood and believed that the Certificates were not with the Respondent.
31. He avers that the Petitioner called him in 2016 requesting for his original certificates which he did not have. It is his contention that the Petitioner never informed him that he had left his original certificates at the Machakos One Store. However, he avers that when he called Mr. Gathuo, he was informed that the police had visited the store and carried documentation with them, including the Petitioner's original certificates.
32. The 4th Affiant avers that the Petitioner instituted this suit before he could be informed of the whereabouts of his certificates. He denied asking the Petitioner to supply original documents for purposes of updating the employment records.
33. In response to the averments made by the 1st to 4th Affiants, the Petitioner filed his Supplementary Affidavit sworn on 13/9/2018. He reiterated the averments made in his Petition and Supporting Affidavit. He maintained that prior to the review, he had reported losses amounting to Kshs.450,000.00 which had been attributable to shortages that had occurred when the cashier received stocks of shoes delivered to the Machakos store on Thursdays when he was off-duty.
34. He denied stealing the shoes as alleged and attributed the shortages to the cashier. He contended that the internal audit was done in his absence which was contrary to company policy and therefore malicious and questionable. As such, he avers that there was no way of verifying that the figures captured in the audit were an accurate representation of the store's state of affairs.
35. He avers that the 1st and 3rd Affiant's averment prove that there had been efforts to sabotage his work. He contends that in response to his demand letter, Peter Giathi denied knowing the whereabouts of his original certificates yet he was aware that the same had been in the possession of Mr. Gathuo and later released to Machakos Police Station. He maintains that he visited the Machakos Police Station on several occasions but was told that no certificates had been surrendered by the Respondent.
36. It is the Petitioner's case that pursuant to a partial consent between the parties involved, his original certificates were to be forwarded to his Advocates who were to forward the same to him. He denies the allegation that the seizure of his original certificates was attributable to his negligence and contends that the same were unlawfully seized and withheld by the Respondent.
37. He maintained that his resignation was due to the malice and injustices against him during the subsistence of his employment. He clarified that the cashier who assisted Mr. Gathuo to sabotage him was Victoria and not Ibrahim who commenced employment 2 weeks after his resignation.
38. He denies being at the store as alleged by Mr. Gathuo since he had resigned on 26/11/2013 and left on 27/11/2013 after handing over to Robert Langat. He maintained that the transfers were sanctioned by Mr. Gathuo to punish him.
39. He urged this Court to allow the Petition as prayed.
40. The Petition was disposed of by way of written submissions with both parties filing their submissions.

The Petitioner's Submissions

41. The Petitioner submits that the Respondent violated his right under Article 41 of the Constitution by specifically and intentionally frustrating him to the point of resignation. Further, the Respondent's working environment was hostile thereby infringing on his rights to reasonable conditions. For instance, Mr. Gathuo frustrated him by initiating his transfer to Malindi and later to Machakos. He also colluded with employees at Machakos One Store to sabotage the Petitioner, by stealing shoes and later laying the blame on him.

42. The Petitioner has relied on the case of Yvonne Achitsa Odedere vs. Maseno University [2017] eKLR which defined unfair labour practice as an unfair act or omission by an employer against an employee and includes an act against the law. He also relied on the cases of Kenya County Government Workers' Union vs. County Government of Nyeri & Another [2015] eKLR and Severine Luyali vs. Ministry of Foreign Affairs & International Trade & 3 Others [2014] eKLR, to buttress his position.

43. According to the Petitioner, the Respondent's act as outlined in his submissions above were malicious and in bad faith. He also submits that by retaining his original certificates, the Respondent acted maliciously and which amounted to an unfair labour practice. It is his view that the inconsistencies in the Affiants' affidavits prove that there had been malice.

44. In light of the above, the Petitioner therefore submits that he is entitled to the reliefs sought having proved that the Respondent acted maliciously and in bad faith, thereby violating his rights under Article 41. He also submits that he is entitled to compensation for breach of his right under Article 41 and relies on the case of Severine Luyali vs. Ministry of Foreign Affairs & International Trade & 3 Others [Supra] where the Court observed that a Court could award damages or compensation as a way of addressing the issue of unfair labour practice.

The Respondent's Submissions

45. The Respondent submits that the Petitioner has failed to elaborate how the working conditions at work were uncondusive neither has he demonstrated the extent of the infringement of his rights thereby the Petition has failed to meet the threshold set out in the case of Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR and AM vs. Premier Academy [2017] eKLR where it was held that any party claiming an infringement of a right must state the right violated and enumerate the manner in which the provision was violated.

46. The Respondent avers that the Petitioner misinterpreted his transfers as a punishment and contends that the Petitioner has exaggerated that he was constantly being transferred yet he was only transferred thrice. It is averred that the transfers were a company policy and were due to the fact that the Petitioner had been promoted to a higher rank hence he was sent to other branches to manage and coordinate. According to the Respondent, the Petitioner's transfer to Malindi was to a higher position and removed him from Mr. Gathuo's influence.

47. To support its case, the Respondent has relied on the case of Elizabeth Washeke & 62 Others vs. Airtel Networks (K) Limited & Another [2013] eKLR where the Court observed that whether the conduct was fair or not involves a degree of subjective judgment.

48. The Respondent submits that the Petitioner resigned without handing over and in order to evade disciplinary proceedings on account of the financial losses incurred by the Respondent. It is submitted that the Petitioner has failed to prove that he took a loan of Kshs.290,000.00 from Kiatu Sacco to cover the shortfalls that had allegedly been reported to Mr. Gathuo.

49. According to the Respondent, this showed that the Petitioner had been guilty of theft as he did not adduce any evidence to show that he had been ordered to compensate the shortfall.

50. The Respondent contends that the Petitioner did not report the shortfall of Kshs. 450,000.00 and an allegation to the contrary was false and misleading. It is submitted that the Petitioner admitted to being negligent by delegating his duty of taking stock to a cashier. The Respondent submits that the Petitioner's actions necessitated an internal audit due to the suspicious activities and operations at the Machakos One Store.

51. The Respondent submits that the Petitioner's documents were not seized as alleged as he abandoned his documents having been found out and the Respondent exercised due diligence by surrendering the same to the Machakos Police Station.

52. The Respondent therefore submits that the Petitioner has failed to meet the threshold set in the cases of Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [Supra] and AM vs. Premier Academy [Supra], hence not entitled to the reliefs sought.

53. I have examined the evidence and submissions of the parties herein.

54. The Petitioner filed this Petition averring breach of his constitutional rights under Article 41 of the Constitution. His contention is that the Respondents mistreated him to the point of making him resign from his employment. The Petitioner contends that he was forced to resign due to acts committed against him by the Respondent's employees as per his evidence. The employees in question denied this in evidence.

55. In the Petitioner's appendix, the resignation letter indicates the reason for the resignation including bad blood with his District Sales Manager and his original certificates being taken away and emotional stress. The resignation was accepted by the Respondents who did not deny the allegations by the Petitioner in the resignation letter.

56. In the evidence by the Respondents, the witnesses admitted that the Petitioner's certificates were left behind and they handed them over to the police. The reason why this was done was also not explained.

57. That as it may be, this being a Petition, the Petitioner has a duty to set out his constitutional rights that have been breached. This is as

per the determination in Anarita Karimi Njeru case and exemplified in the Mumo Matemu case cited by the Respondents herein.

58. In the Petition, the Petitioner only referred to Article 41(1) of the Constitution which deals with fair labour practices. He set out the incidences amounting to unfair labour practices in paragraph 38 of his Petition. Of these issues, the only issue that is proved by the Petitioner is the retaining of his certificates or seizure as he puts it and handing over to the police which is admitted by the Respondents in their evidence.

59. The Petitioner's counsel wrote to the Respondents on 25/6/2015 demanding for these certificates which the Respondents did not inform him they had handed over to the police. The Respondents did not also explain why the same had been given to the police which they now admit in evidence.

60. This act by the Respondent actually shows malice on their part and is an unfair act. If indeed they thought the Claimant had committed some fraud, they should have reported to the police for police action and there is no indication that this was done.

61. The Petitioner also sought to be paid his terminal dues and which the Respondents did not release alleging that they had been withheld against what the Petitioner owed them. Without proof of the debt owed by the Petitioner, it was also illegal for the Respondent to hold onto his terminal dues.

62. The Respondent chose to rely on an audit they conducted after the Petitioner's resignation and without his input and this leaves hanging the question of the audit's credibility.

63. Having found that the Respondents acted maliciously in taking the Petitioner's original certificates to the police station and without notifying him and also by withholding his terminal dues, I find the Petitioner's rights under Article 41 of the Constitution were infringed upon.

64. In terms of remedies, I find for the Petitioner and award him damages equivalent to 2 million.

65. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

66. The Respondent is also ordered to retrieve the Petitioner's certificates handed over to police and surrender them to the Petitioner accordingly within 30 days.

Dated and delivered in Chambers via zoom this 11th day of November, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kabuga holding brief Wathuta for Petitioner – Present

Bonyo for Respondent – Present