



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

PETITION NO.9 OF 2016

RUTTO KAPTO HILLARYPETITIONER

VERSUS

THE OFFICER IN CHARGE NAIVASHA MAIN PRISON 1ST RESPONDENT

THE COMMISSIONER GENERAL OF PRISONS 2ND RESPONDENT

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

JUDGEMENT

On 17th February, 2016 the petitioner filed the petition together with Notice of Motion application seeking urgent orders. The respondents were served and entered appearance through office of the Attorney General and 3rd respondent.

The Notice of Motion was heard and a ruling delivered on 19th September, 2016.

Subsequent to the ruling the respondents were given time to file responses to the petition but there was no compliance.

On 17th March, 2017 the Petitioner filed application and Notice of Motion seeking to amend the Petition which application was allowed and an Amended Petition was filed on 18th April, 2017 and the respondents given time to file response. There was no compliance. Time was extended in this regard for the respondents to comply but there was no response.

On 6th November, 2017 the petitioner was allowed to file a Further Amended Petition, the respondents were served and allowed time to respond but there was no compliance.

On 23rd January, 2018 parties attended court for hearing directions and agreed to address the petition by way of written submissions. Timelines for the filing of submissions were issued. No written submissions were filed.

On 18th September, 2018 the parties attended for taking hearing directions, Okoth Advocate held brief for Biko Advocate for the Petitioner and Ms Cheruiyot, State Counsel attended for the AG and on behalf of the respondent. a hearing date was allocated for the 18th February, 2019.

On the due date the respondents were absent, the State Counsel was absent.

The petitioner was heard by submissions.

There is no reply to the petition and the respondents opted to be absent to make any submissions.

Petition

The petitioner is seeking the following orders;

1. A declaration do issue that the respondents have acted in breach of Article 41 of the constitution of Kenya, 2010 by arbitrary declaring the petitioner to be a deserter from the prisons Service, circulating false and malicious information about the petitioner

character and purporting to dismiss the petitioner from employment without following due process and all acts thereto are null and void.

2. The petitioner be reinstated to employment and he be allowed to continue serving in the Prison Service under the same terms and conditions prior to the *declaration by the 1st* respondent that he was a deserter with effect from 23/11/2015 and he be allowed to proceed on transfer from Naivasha Maximum Prison to any other Correctional Facility for duty.

3. The petitioner be compensated for the breach of his rights under article 41 and 47 of the constitution and for the circulation of the false signals by the respondent.

4. The respondents be prohibited from circulating the declaration that the petitioner is a deserter from the prison service with effect from 23/11/2015 and/or terminating the petitioners' employment.

5. A declaration do issue to the effect that the acts of the respondents in withholding salary payments to the petitioner, denying him access to the work place while he was not on suspension or interdiction amounted to a breach of the right to fair labour practise under article 41 of the constitution, it also amounted to slavery, servitude and inhumane treatment contrary to article 28 and 30 of the constitution and the petitioner be compensated.

6. Payment of the full salary from the month of August, 2015 to the date of reinstatement at the gross monthly rate of ksh.30, 610 according to the payment statements.

7. In the alternative but without prejudice to the foregoing that he be paid:

a. 3 months' salary in lieu of notice at kshs.30,610 at ksh.91,830;

b. 12 months compensation for unfair and unlawful dismissal kshs.367,320;

c. A severance pay of one month basis salary for the remaining years to age 60; and

d. Full terminal benefits in accordance with the applicable scheme of service and or in accordance with the Pensions Act Cap 189.

8. The petitioner be awarded costs.

The fact leading to the petition are that the petitioner is an adult male working with the Prison Service and stationed at Naivasha main Prison. The 1st respondent is the officer in charge of the Naivasha Main prison as established correctional facility under the Prisons Act, the 2nd respondent is the Commissioner General of Prisons and the 3rd respondent is the office establish under the constitution.

The petitioner was employed as a Prison Wader from 22nd December, 2008 in the prisons department and posted to Kilifi GK prison and in the year 2011 he was transferred to Naivasha GK main prison.

The petitioner while in the course of his duty was under the control of the 1st respondent and he fell ill on 17th August, 2015 and taken for in-patient treatment. The 1st respondent was informed of the petitioner's illness and situation and was kept updated of treatment.

Despite the 1st respondent's knowledge of the petitioner's ill-health he proceeded to declare him a deserter with effect from 23rd November, 2015 and issued several signals to various prisons in the republic indicating that his whereabouts were unknown. Such tarnished the name of the petitioner without evidence by indicating in the signal that the petitioner was with full government kit and without the authority and thus cautioned staff to be on the lookout as he was now a conman.

The petitioner is aggrieved by the decision of the 1st respondent which is claimed to be unlawful for the reasons that it is devoid of fair labour practice as the petitioner was condemned unheard by being subjected to unlawful disciplinary sanction for being ill while on duty, issuing misleading information to the public and government officers that there was desertion from duty while the petitioner was ill, labelling the petitioner as a conman and there was no due process.

The dismissal from service was unprocedural and unlawful and the orders sought should issue.

Submissions.

Despite directions being taken to file written submissions, the petitioner attended and opted to make oral submissions. The respondents remained absent.

The petitioner submitted that he was dismissed from the service without due process and has suffered injury and the petition is not challenged and the prayers sought should issue. There should be compensation and payment of lost income.

Upon urging by the court for clarity in the remedies sought, the petitioner submitted that he seeks reinstatement as he was in the public service he can be allocated back his duties. General damages should be paid for injury suffered.

Findings of the court

From the record, it is not lost to the court that parties have casually treated the petition. Despite taking hearing directions and even where the respondent opted not to defend the petition, the petitioner also opted not to file any material with the court to urge his case. By opting for oral submissions which were casually made, it was clear to the court that the serious issues raised in the pleadings were glossed over for expediency.

The court shall however address the merits of the petition based on the pleadings, the brief submissions and the applicable law.

It is common cause that the petitioner was a Prison Warder last working at the Naivasha GK Main prison.

The petitioner under paragraph 11 of the Further Amended Petition avers that on 23rd November, 2015 the respondents caused to be issued several signals indicating his whereabouts were unknown. The specific letter and communication with regard to dismissal from the service for desertion is not attached.

By communication dated 14th December, 2015 by officer in charge, Ngeria Farm Prison, Eldoret there was notification that;

Subject desertion from duty (.) pls be informed that PF... PC Hillary K. Rutto has been absent from duties for a total of 21 days w.e.f 23/11/2015 to date (.) he is therefore declared a deserter in accordance to Prisons Standing Orders Cap 13 sec 35 (1) (i). His whereabouts is not known (.) our signal ref ... are relevant ...

The petitioner's defence is that he fell ill on 17th August, 2015 and had to be taken in-patient and out-patient treatment. The 1st respondent was informed of the illness and situation. Despite such communication, the 1st respondent proceeded to issue several signals to the effect that the petitioner was a deserter.

As a prison warder, and part of prison officers the petitioner's work conduct and regulation was governed under the Prisons Act, the Prisons Standing Orders and the Public Service Commission Act. As part of the disciplined service, the work regulations for absence from duty is regulated.

Even where the petitioner wishes to rely on rights under his employment and service with the 1st respondent, a best practice is established under the Employment Act, 2007 which requires that every employee who is sick, unwell and requires medical attention has the rights subject to communication and authority from the employer. The employer must be informed within a reasonable time and a third party is allowed to deliver such communication and information on condition that the employee must submit the medical certificate from a medical officer from a recognised hospital. See **Peris Nyambura Kimani versus DALbit Petroleum Limited [2014] eKLR**;

...Section 30(2) [Employment Act, 2007] envisage an employee who becomes sick and is not able to apply as under section 30(1), such an employee shall cause the employer to be notified as soon as reasonably practicable of their absence due to the sickness and the reasons for it.

It is therefore imperative upon the employee to ensure the employer is notified of any absence from duty. Where such relates to sickness, a best practice is established under the Employment Act, 2007 and in this case reference for officers in the service of the Prisons there are Standing Orders and regulations. Under the Employment Act, 2007 the court in the case of **Banking, Insurance & Finance Union (Kenya) versus Barclays Bank of Kenya Ltd [2014] eKLR** it was held as follows;

2. For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it. ...

in a case of sickness, an affected employee has a duty that is mandatory to bring to the attention of the employer as soon as is reasonably practicable of any absence due to sickness or illness. Where the absence is caused by sickness or illness such an employee is required to produce a certificate as to the medical condition from a qualified medical practitioner.

in the South Africa Labour Court in **SACWU versus Dyasi [2001] 7 BLLR 731 (LAC)** the Court held that desertion of duty amounts to repudiation of the contract of employment which the employer is entitled to accept or reject. The acceptance of repudiation amounts to dismissal if employee fails to render service.

In this case the petitioner's case is that he fell ill on 17th August, 2015. He has attached medical records dated 22nd January, 2016 giving a chronology of treatment records that on 1st August, 2015 he was treated, on 28th August, 2015, 23rd November, 2015 he was treated but there is no admission in a the facility in a manner suggesting that he was unable to attend work of cause to be reported that he was unable to attend work.

The treatment facility has its address at Nakuru.

By letter dated 15th October, 2016 is a letter issued to the effect that the petitioner was admitted at Nyahururu County Hospital from 20th to 31st July, 2015.

The treatment facility is in Nyahururu.

An undated sick sheet by Moi Teaching and Referral Hospital notes that the petitioner was given 14 days off duty w.e.f 20th November to 4th December, 2015.

This is a facility is Uasin Gishu County.

There is no evidence that these treatment records were received by the respondents or submitted at the duty station or by the 1st respondent. Even where such were issued, the absence of the petitioner from duty from 23rd November, 2015 is not explained. Even where he may have been indisposed from such date, the sick sheet from Moi Teaching Referral Hospital giving the petitioner 14 days off duty from 20th November, to 4th December, 2015 suggests that he was not hospitalised for such period and a diligent employee should have submitted such record with the employer or the 1st respondent in this case.

Without the petitioner demonstrating that the exhibited medical records, documents and notices were brought to the attention of his employer and superiors, there is nothing to support his absence from work. Absence from duty was not justified. The sick off sheet though undated was for the benefit of the petitioner taking the noted sick off days but had to be brought to the attention of his superiors.

Without the respondent being notified of the reason(s) for the absence of an officer in the service, the court finds the signals issued on his absence and desertion were justified. Despite the petitioner being aware of the signals sent out with regard to his whereabouts being unknown, there is no evidence that he caused the 1st respondent to have the sick off sheet.

The dismissal from the service of the Kenya Prisons is justified.

On the remedies sought, reinstatement back in the service even where there is a finding that dismissal was justified is not available. Where signal issued and desertion was asserted from 23rd November, 2015 it is since over three years and reinstatement being an order for specific performance should not issue after such period of time has lapsed. Such remedy should only issue in exceptional circumstances.

On the claims for salary due for August, 2015, notice pay for 3 months and 12 months' pay for unfair dismissal, the petitioner has pleaded that he was not at work from August, 2015. His absence has been established was without approval, notice and consent of the respondents. Payment for work not done would be contrary to fair labour practice. The petitioner for notice pay where the petitioner failed to attend work without notice to the employer is not justified. Compensation is not available.

On the claim for salary due until the age of retirement and terminal benefits under the Pensions Act, the dismissal from service being justified, such remedies are lost.

Accordingly, even though the petition is not challenged, the same is devoid of any merit and is hereby dismissed in its entirety. No orders to costs.

Delivered at Nakuru this 28th day of February, 2019.

M. MBARU

JUDGE

In the presence of: