



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**ELRC PETITION NO. 10 OF 2015.**

*(Before Hon. Justice Mathews N. Nduma)*

**CLEMENT ERNEST OPIYO MURENGA.....PETITIONER**

**VERSUS**

**PRINCIPAL SECRETARY, TREASURY.....1<sup>ST</sup> RESPONDENT**

**COMMISSIONER OF CUSTOMS, KENYA**

**REVENUE AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The petition was filed on 27<sup>th</sup> March 2014. The petitioner prays for:

(a) Declarations that the petitioner's rights under *Article 47(1) and (2), 50(1), 28, 25(e), 41(1) and 35(2) of the constitution of Kenya 2010* have been breached and violated by the Respondents.

(b) For compensation for lost salary and other benefits going with the job from February 1981 to the date the petitioner was retired from the service.

(c) For damages

**Facts of the petition**

2. From the body of the petition and the supporting affidavit of the petitioner the following are the facts of the case:

3. The petitioner was employed by the defunct East African Community in 1975 in customs Department. The department was absorbed by the Ministry of Finance in 1977 upon collapse of the community. The petitioner was stationed at Jomo Kenyatta international Airport.

4. In August 1981, the petitioner was charged with the offence of making a customs entry without authority at Makadara law courts Nairobi in *criminal case number 12467 of 1981; Republic versus Clement Opiyo Murenga and another*. He was interdicted on half pay.

5. On 21st December 1983, the petitioner was acquitted of the charge for no case to answer.

6. The petitioner requested for the suspension to be lifted but discovered that he had been dismissed from employment by a letter dated 29<sup>th</sup> May 1985 for desertion of duty.

7. The petitioner states that he was dismissed without a hearing in violation of *Article 50(1) of the constitution*. The respondent stopped paying the claimant the half salary in March 1985 without giving the claimant reasons for the action. The claimant states that this action was in breach of *Article 28, 25(a) and 41(1) of the constitution*.

8. The petitioner denies that he deserted work and prays for the reliefs sought to be granted.

9. The Court of Appeal made a ruling referring the petitioner back for trial in this court upon setting aside a ruling by Maureen Onyango – J.

10. 1<sup>st</sup> respondent filed a replying affidavit to the petition sworn by Dr. Kamau Thugge on 28<sup>th</sup> September 2018.

11. Dr. Thugge deposes that the petitioner was transferred to the ministry of finance for the East African Community with effect from 1<sup>st</sup> July 1977. That the petitioner while serving in the ministry applied and was granted his annual leave with effect from 26<sup>th</sup> November 1984 to 31<sup>st</sup> December 1984.

12. That the petitioner failed to resume duty upon expiry of the leave period thereby deserting official duty without lawful permission or leave on adverse dates between 2<sup>nd</sup> January 1985 and 15<sup>th</sup> March 1985. The 1<sup>st</sup> respondent stopped the petitioner's salary with effect from 1<sup>st</sup> March 1985 with the whereabouts of the petitioner still unknown.

13. The petitioner was issued with a show cause letter dated 15<sup>th</sup> March 1985 asking him to show cause why he should not be dismissed from service on account of absence from duty without permission and/or leave. The show cause marked 'KT2'.

14. That the respondent having sent the petitioner the letter to show cause vide registered mail to his last known address and having failed to attend, the petitioner's case was tabled before the Ministerial Advisory Committee which committee recommended that the petitioner be dismissed from service in accordance with the prevailing service regulations with effect from 2<sup>nd</sup> January 1985.

15. The letter of dismissal dated 29<sup>th</sup> May 1985 was produced as exhibit 'KT3'. Dismissal was with effect from 2<sup>nd</sup> January 1985.

16. The petitioner lodged an appeal against his dismissal to the public service commission by a letter dated 3<sup>rd</sup> November 1992, 7 years after dismissal. The PSC dismissed the Appeal upon due process and informed the petitioner.

17. The petitioner made a second appeal to the Public Service Commission on 7<sup>th</sup> April 2004, twelve (12) years after the first appeal was disallowed and the appeal was consequently dismissed by the Public Service Commission for lack of merit and the petitioner's failure to justify his unauthorized absence from duty.

18. The 1<sup>st</sup> respondent states that the petition is time barred it lacks merit and it be dismissed.

19. The petitioner filed a further Affidavit in reply to Dr. Kamau Thugge sworn on 11<sup>th</sup> October 2018. The petitioner denies ever having applied for leave nor granted any as the 1<sup>st</sup> respondent alleges or at all.

20. The petitioner denies having deserted duty since he was reporting once a month to his reporting officer, Principal Collector of customs and Excise at Jomo Kenyatta International Airport Mr. Musyoka. That he never received letter dated 5<sup>th</sup> October 1984 lifting his interdiction. That his whereabouts was known since he was reporting once a month to Mr. Musoka.

21. That the letter of dismissal did not reach the petitioner and it was wrongly addressed since he has never worked in the pension's office treasury. On the face of the letter, the ministry wrote the letter to itself. The letter is dated 15<sup>th</sup> March 1985 and was received by the Ministry on 30<sup>th</sup> April 1985.

22. That there is no evidence that the petitioner's case was tabled before the Ministerial Advisory Committee. That the petitioner requested for minutes to no avail.

23. That the petitioner in his appeals only sought to know why his half salary was stopped. That it is not clear why there are two dismissal letters, one dated 29<sup>th</sup> May 1985 and another 11<sup>th</sup> March 2004.

24. That the records were not availed to the ombudsman upon request.

25. The petitioner had filed submissions before the High Court on 22<sup>nd</sup> January 2015 and filed further submissions on 12<sup>th</sup> October 2018. The 1<sup>st</sup> Respondent filed submissions on 25<sup>th</sup> October 2018. The 2<sup>nd</sup> respondent had filed submission on 10<sup>th</sup> February 2015.

### **Determination**

26. The dispute in between the petitioner and the 1<sup>st</sup> respondent is being common cause that the 1<sup>st</sup> respondent was the employer of the petitioner from 1977 until he was interdicted in December 1983, and allegedly dismissed from employment vide a letter dated 15<sup>th</sup> March 1985 for desertion.

27. The issues for determination are:

(a) Whether the 1<sup>st</sup> respondent violated the rights of the petitioner as alleged in the petition.

(b) Whether the petitioner is entitled the reliefs sought.

**Issue (a)**

28. The court of Appeal in its judgment delivered on 20<sup>th</sup> July 2017, from a ruling of Maureen J. in this matter found that the petitioner raises constitutional violations which are continuing in nature and therefore the petitioner is not time barred. The Court of Appeal also found that the retired constitution and the present one have not specified a period of limitation within which a constitutional petition ought to be filed. The court found that the issue of limitation does not arise and therefore I will not revisit this matter at all.

29. The issue I endeavor to resolve is whether the petitioner has proved on a balance of probabilities that his constitutional rights have been violated and continue to be violated by the respondents in the manner set out in the petition.

30. The petitioner's case is that he was kept under interdiction on half pay from December 1983 and the half salary was stopped without notification and/or following any de process with effect from 15<sup>th</sup> March 1985.

31. To the contrary, the respondents state that the petitioner applied for leave from 26<sup>th</sup> November 1984, to 31<sup>st</sup> December 1984. That between 2<sup>nd</sup> January 1985, and 15<sup>th</sup> March 1985, the petitioner did not report to work and the respondent upon notifying the petitioner to show cause vide his last address purportedly stopped his salary with effect from 1<sup>st</sup> March 1985, upon his failure to respond to the notice to show cause and his whereabouts were not known.

32. The petitioner in his further affidavit refutes the aforesaid allegations by Dr. Thugge as set out before.

33. In terms of Section 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya, the petitioner bears the onus of proving the facts on which his case is based on a balance of probability.

34. Furthermore, following the decision of the Court of Appeal in *Awanita Karimi Njeru*, it is the petitioner's duty to plead his case with precision regarding the provisions of the constitution that have been violated and the manner his rights have been violated by the respondents.

35. The petitioner stated in the petition that he was kept in the dark since 15<sup>th</sup> March 1985 as to why his salary was stopped despite having been acquitted of the criminal charges laid against him on 21<sup>st</sup> December 1983 for no case to answer.

36. The petitioner avers that the respondents violated *Articles 47(1) and (2) of the constitution of Kenya 2010* since he was tossed between the two respondents and his case was not handled expeditiously and efficiently. That the petitioner was not given any reasons for such mistreatment, and the procedure followed by the respondents was unfair. That the dismissal for desertion without serving the petitioner with the notice to show cause violated *Article 50(1) of the constitution of Kenya 2010*. He was not given a fair hearing.

37. That the petitioner was treated in a degrading and inhuman manner for being kept with half salary for over a year without informing him as to the reasons for the action and the stoppage of the half salary in 1985 without giving reasons. That this conduct breached *Articles 28, 25(e) and 41(1) of the constitution of Kenya 2010*.

38. That the petitioner has been ridiculed and suffered in the eyes of the public for the misinformation that he was dismissed for desertion. The petitioner prays that positions be arrested in terms of *Article 35(2) of the constitution*.

39. That court has carefully considered the compelling evidence in the matter and is satisfied of the following facts:

(a) A letter dated 15<sup>th</sup> March 1985 was sent to Mr. C.E Murenga Opiyo by registered post to P O Box 45, Port Victoria Kisumu by Mr. J.O Otweyo for permanent Secretary/Treasury asking the petitioner to show cause why he should not be dismissed for deserting work since the petitioner took leave between 26<sup>th</sup> November 1984 to 31<sup>st</sup> December 1984.

(b) The court is satisfied that the 1<sup>st</sup> respondent wrote a letter dated 29<sup>th</sup> May 1985, dismissing the petitioner from work with effect from 2<sup>nd</sup> January 1985 following a sitting of the Ministerial Advisory Committee.

40. The court is further satisfied that by a letter dated 5<sup>th</sup> October 1984, the interdiction of the petitioner had been lifted by Mr. J.T.N Sabani for the permanent Secretary. That the petitioner had in the said letter lifting interdiction given a final warning. It was after this lifting of interdiction that the petitioner had taken leave and failed to return to work.

41. The letter dated 31<sup>st</sup> January 1985, stopped the salary of the petitioner upon his failure to return from leave. This letter was written by Mr. B.A.O Jakaila for Principal Pension's officer, which station the petitioner had been posted to from 26<sup>th</sup> November 1984. That the petitioner was granted leave upon being posted to the pensions department to replace Mr. N. Mwaniki.

42. It is a fact that the petitioner appealed the dismissal and the appeal was dismissed by the public service commission by a letter dated 11<sup>th</sup> March 2004. The appeal was filed on 15<sup>th</sup> February 1993, 7 years after dismissal.

43. The petitioner had in the appeal justified his absence from work on illness. There was no evidence that the petitioner and/or his relatives had reported the alleged illness to the respondents. The appeal was however forwarded to the Public Service Commission on 24<sup>th</sup> September 2003, which the court's view was inordinate delay being 18 years from the date of dismissal.

44. The Public Service Commission had considered the merits and demerits of the case and had found that the dismissal of the claimant was for a valid reason and did not fault the procedure used in finding the petitioner guilty of absconding work and dismissed him from employment accordingly.

45. From the compelling facts disclosed by the petitioner and the respondents in the case, the court is satisfied that the petitioner has not established that the reason that led to his dismissal from work was invalid. The court has found that the petitioner was dismissed following a sitting of the Advisory Committee that was charged with disciplinary matters at the respondents employ. The court is satisfied that the petitioner exhausted the internal appellate procedures though concluded upon inordinate delay on the part of the petitioner and the respondents in equal measure.

46. Of particular note is the reason of 'ill health' given to the respondents by the petitioner in his appeal letters. Furthermore, there is no documentary evidence that the petitioner during the period of interdiction to the time of dismissal and from the dismissal to the times, the two internal appeals were heard and determined had followed up the issue of his interdiction and salary stoppage closely.

47. The court gets the impression that the petitioner was indolent in the manner he followed up the issue upon his acquittal by the criminal court.

48. The court believes the evidence by the 1<sup>st</sup> petitioner that the petitioner was granted leave upon application and deserted work for a prolonged period. The petitioner has in the circumstances failed to discharge the onus placed on him of proving his case on a balance of probabilities. To the contrary, the respondents have rebutted ably the evidence tendered by the petitioner and the court is satisfied that the dismissal of the petitioner from employment by the 1<sup>st</sup> petitioner was lawful and fair. The alleged violations of provisions of constitution of Kenya 2010 retrospectively lack merit and are dismissed for want of proof.

49. The petitioner did not adduce any evidence as to his employment status with other employers or otherwise since he left the employ of the respondents. The allegations of damage suffered as a result of the separation with the respondents has not been satisfactorily established also.

50. Accordingly, the entire petition by the petitioner lacks merit and is dismissed.

51. The petition has protracted for a long time through no fault of the petitioner. The respondent is the Government of Kenya whereas the financial status of the petitioner to date is unclear. Accordingly, this is an appropriate case for each party to bear their costs of the suit.

**Judgment Dated, Signed and delivered this 20<sup>th</sup> day of May, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. J.V. Juma for the petitioner

M/S Lorna Orege for the 1<sup>st</sup> respondent.

Mr. Twahir Mohamed for the 2<sup>nd</sup> respondent

Chrispo: Court clerk