



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 46 OF 2017

ANTONY JONATHAN NGANGA WEKESA.....PETITIONER

- VERSUS -

KENYA COMMERCIAL BANK.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 18th May, 2018)

JUDGMENT

The claimant filed the petition on 22.05.2017 through Masaviru & Ketoo Advocates. The petition invoked Articles 2(1), 23(1), 27, 28, 40, 41, and 47 of the Constitution of Kenya, 2010. It was said to be in the matter of the doctrine of legitimate expectation, reasonableness and the doctrine of proportionality, and, in the matter of section 41(1) and (2) of the Employment Act, 2007. The petitioner prayed for judgment against the respondent for:

- a) A declaration that the actions and omissions of the respondent in dealing with the petitioner are unlawful, illegal, unprocedural, unjustified, inhuman and in violation of the Constitution more so in breach of petitioner's fundamental rights and freedoms as espoused under Articles 2, 23(1), 27, 28, 41(1), 47 and 57 of the Constitution of Kenya, 2010.
- b) An order for general, exemplary and punitive damages on an aggravated scale for the pain and suffering caused by the respondent's actions.
- c) An order compelling the respondent to compute and release to the petitioner a half salary at the end of each month pending the hearing and determination of criminal case 413/2014.
- d) An order compelling the respondent to compute and release the sum of Kshs. 1, 849, 815.00 being the half salary owing and payable to the respondent for the entire suspension period to date.
- e) Interest on (d) above.
- f) An order compelling the respondent to forthwith discharge the petitioner of any liability on account of loan account MG1310200450 and unconditionally release the original title deed for LR. Mavoko town Block 2/9194.
- g) Costs.

The petition was based on the petitioner's supporting affidavit and attached exhibits filed together with the petition.

The respondent opposed the petition by filing on 15.08.2017 the replying affidavit of Bramwel S. Mbirika, the respondent's Manager, Employee Relations, and through Kamotho Maiyo & Mbatia Advocates.

The petitioner filed further supporting affidavits on 24.10.2017 and 06.04.2018. The respondent filed further affidavits dated 22.03.2018 and 26.03.2018.

It is not disputed that the petitioner was employed by the respondent. The petitioner says the relationship started in 2009 when he was engaged as a clerk and the respondent says that the initial appointment was as a graduate trainee on 24.11.2011. Parties are not in dispute that by the letter dated 03.12.2013 the petitioner was promoted to Assistant Manager, Accounts & Reconciliation – Back Office & Customer Service Division effective 09.12.2013. The consolidated basic and gross pay was Kshs. 99, 990.00. The respondent addressed to the petitioner the letter dated 19.03.2014 on suspension as follows:

“RE: SUSPENSION FROM EMPLOYMENT

This has reference to the discussions held and correspondence exchanged.

We advise that it has been decided that you be suspended from employment with effect from today’s date, pending further investigations on the irregularities you appear to have committed, details of which you are aware.

During suspension, you will be paid at the rate of half salary.

Please note to notify your Manager in case you may want to be away from your usual place of residence for a period exceeding one week. Let us also have your usual mobile phone number and your contact addresses to enable us reaches you whenever you are required.

Kindly acknowledge receipt of this letter by signing the copy attached and returning it to this office.

Signed

Japheth M. Mulandi

Head of CPC”

The petitioner’s case is that the respondent has failed to pay the half salary per the letter of suspension and further failed to undertake the relevant disciplinary process flowing from the suspension. Thus, it is urged that the respondent’s actions have amounted to unfair labour practices in violation of Article 41(1) of the Constitution.

The respondent’s case is that between 17.02.2010 and 31.01.2014 the respondent lost a sum of Kshs. 6, 860, 642.17 through fraudulent transactions. Further, internal investigations showed that the petitioner had raised various entries that debited the bank’s books and the bank PL account and credited the funds to various customers’ accounts. The respondent engaged the petitioner about the issue and a decision was made to suspend the petitioner to facilitate further investigation of the fraudulent transactions. The relevant investigation report was exhibited as KCB2 on the replying affidavit and dated 19.10.2016 (long after the letter of termination dated 31.03.2014).

That by the letter dated 25.03.2014 the respondent says it tried to reach the petitioner to notify the disciplinary hearing meetings but the petitioner failed to cooperate and did not attend the hearing. Accordingly, the respondent proceeded to terminate the petitioner’s employment by the letter dated 31.03.2014. Loans owed to the bank by the petitioner were to be converted to public terms effective 31.03.2014. For that purpose the petitioner was to contact the respondent’s Head of Credit Administration within 15 days from the date of the letter with a proposal on how the petitioner was to settle the loans. The termination letter concluded that the petitioner signs the attached copy to acknowledge receipt of the letter.

Accordingly, the respondent’s case was that the petitioner was no longer its employee and the petition was unfounded.

The petitioner denies that he was invited to disciplinary hearing by a letter dated 25.03.2014 and whose copy was not exhibited on the replying affidavit. Further, if indeed he had been dismissed by the letter dated 31.03.2014, it is impossible that the respondent had written the document of 19.10.2016 titled **“Suspected fraudulent transactions debiting bank books and the bank PL Account and crediting the funds to various customers’ accounts”** and details of which were set out in that document or purported report. The petitioner’s case was that he never received the termination letter and he never received the letter of invitation to disciplinary hearing as alleged for respondent (like he had received correspondence from the respondent about the loan accounts). Further no explanation was given why the respondent failed to telephone the petitioner to collect the mails. Further, the petitioner’s case is that only a licensed process server could deliver the mails and one Bonface Odhiambo Gilly is not said to have been the respondent’s employee so that the respondent’s policy on delivery of mails had been contravened.

The said Boniface Odhiambo Gilly filed the affidavit sworn on 26.03.2018 and he simply says that he was the petitioner’s neighbour at Komarock Infill A Block 12, House Number 7 and that he delivered to the petitioner the exhibited letter of 25.03.2014 being invitation to the disciplinary hearing scheduled for 28.03.2014. The petitioner has denied such delivery as the same was not documented. The said Boniface has not disclosed his designation and that he had been employed by the respondent to perform such duties of a messenger. The postage certificates had been altered and therefore could not be relied upon and the same cannot be verifiable from the Postal Corporation of Kenya because the records have since been destroyed or disposed of in accordance with the Corporation’s rules on retention of records. The petitioner further urges that no disciplinary hearing was convened because no minutes were filed to confirm the respondent’s allegation.

The **1st issue** for determination is whether the petitioner was invited for the disciplinary hearing and whether the disciplinary hearing took place. The suspension letter is clear. The petitioner was to remain at his usual place of residence, he was to provide his telephone number, and he was to provide postal address. It is not clear why the two letters in dispute were not hand delivered at the petitioner’s residence and such delivery documented or the petitioner telephoned to collect them. The purported certificate of postage of the termination letter is indeed altered to include the petitioner’s name and the Court returns that as submitted for the petitioner, the same is incredible and unreliable. Further the Court has noted the exhibit KCB 2 on the replying affidavit and authored on 19.10.2016. The court returns that if that report, which is not signed, was to form basis of the termination, the same could not have come very belatedly after the alleged termination on 31.03.2014.

The Court has considered the letter dated 03.11.2016 by the petitioner’s advocates to the respondent’s Director of Human Resource. It is referenced **“Antony Wekesa Staff No. 11882.”** It demands payment of half salary per letter of suspension dated 19.03.2014. The respondent

replied that letter by the one dated 15.11.2016 and where the respondent never mentioned that the petitioner had been dismissed and never replied to the specific demand for payment of the half salaries during the petitioner's suspension.

The Court returns that taking into account all the material and evidence on record, the alleged letter purporting to terminate the petitioner's employment was never delivered and the alleged letter on invitation to disciplinary hearing was equally not delivered. Thus the Court returns that the alleged disciplinary hearing never took place. Indeed, the minutes of the deliberations were not filed and the Court returns that the suspension has never been lifted and the petitioner continues in the respondent's employment upon the terms of the suspension letter. While making that finding the Court has noted that the terms of the termination letter were that the loans owed by the petitioner were to revert to public terms but that issue was not clearly addressed in the affidavits – suggesting that the loans had not so reverted at all material times because the petitioner had not been terminated.

To answer the 2nd issue for determination, the court returns that the respondent has violated the petitioner's right to fair labour practices as protected under Article 41 (1) of the Constitution. First, the petitioner has established that the respondent has failed to initiate and conclude the relevant disciplinary process in accordance with the relevant contractual and statutory provisions. Second, the petitioner has established that the respondent has failed to comply with the terms of the suspension letter to pay half salary during the suspension period. The petitioner is entitled to remedies in that regard and as prayed for.

The 3rd issue for determination is whether the petitioner is entitled to the other remedies as prayed for. The Court makes findings as follows:

a) The petitioner has submitted that he fully paid the secured loan thereby expecting the security to be released but the respondent opted to apply the monies paid to both secured and unsecured loans. The court has carefully considered the material on record and returns that the issue of outstanding loans as pleaded and in view of the relief sought falls outside the contract of employment and it has not been shown how the jurisdiction of the Court begins to apply. The Court will not delve into the issue for want of jurisdiction and the prayers made in that regard will fail.

b) It has been submitted for the petitioner that all respondent's employees on suspension by policy are entitled to half pay during suspension. Thus, it was submitted that the petitioner had been discriminated because his half salary had not been paid and that Article 27 (2) which entitled petitioner to equal enjoyment of rights had been violated. The Court does not agree. First, the petitioner by the terms of the suspension letter was awarded half pay during suspension only that it had not been implemented. Second, the alleged policy was not exhibited and payment of half salary to employees on suspension was not verified as against the alleged policy such as by exhibiting such previous payments. The prayer in that regard will fail.

In conclusion judgment is hereby entered for the petitioner against the respondent for:

a) A declaration that the actions and omissions of the respondent in dealing with the petitioner are unlawful, illegal, unprocedural, unjustified, inhuman and in violation of the Constitution more so in breach of petitioner's fundamental rights and freedoms as espoused under 41(1) of the Constitution of Kenya, 2010.

b) An order compelling the respondent to compute and release the sum of **Kshs. 1, 849, 815.00** being the half salary owing and payable to the respondent for the entire suspension period (as at the date of the suit) and to continue paying until the suspension is lifted or the contract of employment between the parties otherwise lawfully terminated, whichever will be earlier.

c) The respondent to pay the amounts in (b) above by 01.08.2018 failing interest at court rates be payable from the date of this judgment.

d) The respondent to pay costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 18th May, 2018.

BYRAM ONGAYA

JUDGE