



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
PETITION NO. 65 OF 2014

(Formerly H.C. Constitutional and Human Petition 472 of 2013)

MWAKAI KIKONDE SIO PETITIONER

VERSUS

THE KENYA UTALII COLLEGE 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. The Petition dated 20th September 2013 was filed at the High Court Constitutional and Human Rights Division on 26th September 2013. The Petition was subsequently transferred to the Employment and Labour Relations Court (ELRC) vide a ruling on jurisdiction by Isaac Lenaola, J. delivered on 120th October 2014.
2. The 1st Respondent, The Kenya Utalii College admits in the Replying Affidavit of Jane Muriithi, the Acting Deputy Human Resource Manager of the 1st Respondent, that the Petitioner was an Assistant lecturer with the 1st Respondent and later was promoted to position of Principal of the 1st Respondent pursuant to a letter from the Ministry of Tourism and Wildlife dated 29th July 1986 which appointment was by the President then.
3. In the written submissions by the 1st Respondent filed on 16th July 2014, the 1st Respondent lists facts not in disputed to include;

“That the Petitioner was an employee of the 1st Respondent having started as an Assistant Lecturer and rising to Principal of the 1st Respondent.

The relationship between the Petitioner and 1st Respondent was that of an employer and employee at all material times”

4. Though initially, the issue as to whom between the 1st and 2nd Respondents was the employer of the Petitioner was raised, it is perfectly clear that the 1st Respondents admits that it was indeed the employer of the 1st Respondent.
5. The Petitioner is in full agreement with this position.

Indeed, the 2nd Respondent in its written submissions dated 23rd April 2015 states, which

submission the Court agrees with, that *“The 1st Respondent is a body corporate which is a legal entity with perpetual succession and capable of suing and being sued on its own name.*

6. The 2nd Respondent was not a party to the contract between the Petitioner and the 1st Respondent
7. However by dint of Article 156(3)(a) &(b) of the Constitution of Kenya, 2010, the Attorney General is the Principal Legal Advisor of Government and is mandated to represent the Government in any other legal proceedings to which the National Government is a party
8. The Attorney General is therefore a necessary party in this Petition since the 1st Respondent, though an independent body is a National Government Institution.
9. The 2nd issue for determination is whether the 1st Respondent violated the Petitioner’s rights under the Constitution, as set out in the Petition.

Article 22(1) of the Constitution of Kenya, 2010 provides as follows;

“Every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is therefore”

10. The fact that the Constitution of Kenya provided for redress of violations of human rights to all persons generally does not negate the fact that, the legislature has enacted legislation specific to violations of the same rights at the work place as a means of providing mechanisms for getting specific redress in labour disputes.
11. Approaching the Court by way of a Petition in most cases clouds the labour issues in the dispute and may prejudice the Petitioner due to the standard of pleadings required in constitutional petitions. However a Petition cannot be struck for the reason only that it canvasses Employment and Labour issues.
12. The facts of this case set out in the Petition as follows;

On 15th April 1975, the Petitioner was employed by the 1st Respondent as an Assistant Lecturer on permanent and pensionable terms. The Petitioner rose through the ranks and upto the position of Deputy Principal.

13. On 15th July 1986, the Petitioner was appointed the principal and Chief executive of the 1st Respondent.

The letter of appointment dated 29th July 1986, written and signed by A.K. Kandie , Permanent Secretary Ministry of Tourism and Wildlife, stated inter alia “you will retain your present permanent and pensionable status under the Kenya Utalii College Terms and Conditions of service. Your new appointment shall be in Grade “A” with a salary scale of K£ 5100 x 201 - K£5904 p.a. You will enter this salary scale at K£5904 p.a. and you incremental date will be 1st May as before”.

14. It is clear from this letter that, the 1st Respondent remained and was at all material times the Employer of the Petitioner.
15. Following a students strike on 10th March 21003, at Utalii College, the Petitioner was sent on compulsory leave by the then Assistant Minister for Tourism and Information the Hon. Beth Mugo on 11th March 2003.
16. The action was not preceded by any formal investigations and / or any disciplinary process. An Acting Principal was appointed immediately.
17. The Petitioner remained on leave until the 31st November 2003, the Permanent Secretary Ministry of Tourism and Information informed the Petitioner that the Government had appointed Mr. Philemon Mwaisaka as the Principal of Utalii College and that the Petitioner’s appointment as the principal of the 1st Respondent had ceased. The Petitioner was advised to await further

- communication on his status.
18. The Petitioner had remained on full pay and all his remuneration was paid until sometimes in October 2007, when the 1st Respondent, without notice terminated the pay to the Petitioner and removed the Petitioner from the payroll. All benefits previously accorded the Claimant, including medical cover and security were withdrawn.
 19. The Petitioner states that these actions were taken without giving the Petitioner any notice or reasons despite the facts that he remained a public servant.
 20. The Petitioner makes the following averments in his petition following the aforesaid events;
 - a. The Petitioner had legitimate expectation that he His salary and all benefits until the Government made a decision on his position in the public service and informed him as earlier advised.
 - b. The suspension and termination without notice of wrongdoing, infringed on the Petitioner's right to fair hearing and due process, the Rules of natural justice.
 - c. That the Petitioner's right to livelihood protected under Section 21(1) of The Constitution of Kenya, 1960 (now repealed, was violated in that the Petitioner was left destitute, without money to pay school fees for his school going children and with a bounced mortgage standing order yet he was a public servant who had served his country and Utalii College with distinction and uplifted the status of the 1st Respondent by, inter alia;
 - i. Spearheading the recognition of Utalii College by the World Tourism Organisation as a Centre of Excellence in 1994;
 - ii. Spearheading its designation as the Centre of Excellence for hospitality training for the East Africa Community and;
 - iii. Organizing and hospitality that postpones EUHUFA Congress (the only college in a third world country to.....)
 - d. The petitioner further avers that he was treated in an inhuman and degrading manner contrary to section 74(1) of the Kenya Constitution 1969.
 21. The Petitioner states that his efforts to get the 1st Respondent to address his plight elicited no response until 8th April, 2004 when the Chairman of the Board of Governors of the 1st Respondent wrote to the Petitioner to the effect that the petitioner'sand an employee of the 1st Respondent had caused with effect from 17th December, 2003 pursuant to Gazette Notice No 535 dated 7th January, 2004.
 22. By a letter dated 21st April, 2004, the 1st Respondent informed the Petitioner that it would pay to the Petitioner his terminal dues coupled at Kshs 5,227,028.46 subject to the Petitioner's clearance with the college and of any pending liabilities owed to the college.
 23. On 28th April, 2004, the petitioner confirmed having cleared with the Utalii College. The Petitioner was however not paid his terminal dues until the 6th December, 2005 when the 1st Respondent partly paid the Petitioner by a cheque of Kshs 2,175,504.35 in respect of Pension dues leaving a balance of Kshs 3,051,524.11.
 24. The 1st Respondent further paid the Petitioner Kshs 115,346.20 on 24th June 2007 Kshs 80,742.00 on 13th August, 2007 and Kshs 188,398.86 on 24th August, 2009.
 25. The Petitioner avers that he was paid by the 1st Respondent a total of Kshs 2,667,037.05 leaving a balance of Kshs 2,559,991.00 which amount remains unpaid to date. The Petitioner has made several reminders to the 1st Respondent to pay the balance but the 1st Respondent has refused and/or neglected to pay the balance. The 1st Respondent has not provided the petition with a statement of account explaining the basis or the computation of the Petitioner's terminal dues. The Petitioner therefore avers that:
 - e. his right to property protected under Section 75 of the Constitution of Kenya 1969 was violated.

f. The Petitioner further avers that failure by the 1st Respondent to address the issue of the Petitioner's terminal dues in respect of the employment in an efficient manner and or within a reasonable period isbreach of the Petitioner's right to an expeditious efficient reasonable and procedurally fair administrative action protected by Article 47(1) of The Constitution of Kenya 2010.

26. The Petitioner avers that, consequent to the aforesaid breach he has suffered loss and damage and claims damages in respect thereof. That the conduct of the Respondent is illegal, unconstitutional, arbitrary oppressive and unreasonable. That there are no civil, criminal or any other proceedings in respect of or in any way connected to the issues in this petition.

27. Declaratory orders are sought in respect of the enumerated violations and a mandatory order directing the 1st Respondent to compute and pay the Petitioner all emoluments and benefits to the Petitioner from the date he was removed from the payroll (November 2003) until the date he was re-deployed on 12th September, 2007.

The Petitioner fully seeks:

- a. General damages against the Respondents for loss and inconveniences suffered by the Petitioner.
- b. Specific damages to be calculated at the rate of the Petitioner'sremuneration from November 2003 until the 12th September, 2007.
- c. Costs of the petition.

28. The petition is supported by an affidavit of the Petitioner deposed to on 20th September, 2013 and enumerated thereto and a further affidavit sworn on 7th May, 2014.

Replying Affidavit

29. The 1st Respondent relies on the Affidavit of Jane Muriithi Acting Deputy Human Resource Manager of the 1st Respondent. The 2nd Respondent did not file any Replying Affidavit.

30. The nub of the 1st Respondent's defence is that;

- a. The Petition is incompetent as it does not qualify as a Constitutional matter since the Petitioner in his petition is seeking inter alia;
 - a. General damages against the Respondent for losses and inconveniences suffered by the Petitioner in relation to this employment.
 - b. Specific damages to be calculated at the rate of the Petitioner's pay including attendant benefits all of which are reliefs which the Employment and Labour Relations Court is under the constitution exclusively mandated to address.

31. Furthermore the dispute arises from a termination of employment a mundane matter for determination by the Employment and Labour Relations Court.

32. The 1st Respondent goes ahead to fully blame the Ministry of Tourism for the appointment and dismissal of the Petitioner and distances itself from the predicament that befell the Petitioner.

33. The 1st Respondent further states that on 21st November, 2013, the Ministry of Tourism appointed a new principal and it simply obliged by receiving him and would therefore not have continued to pay the Petitioner any further remuneration.

34. To this extent, the 1st Respondent makes bare denial of the allegations made by the Petitioner that his employment was terminated without notice and no reasons were given for the same.

35. The 1st Respondent also makes bare denial of the allegations by the Petitioner that he was not given any hearing at all and was subjected to degrading and inhuman conditions by being denied means of livelihood without any reason and/or any due process.

36. Indeed there is no attempt by the 1st Respondent to show that any due process was put in place in the termination of the employment of this Petitioner.

37. The defence put by the 1st Respondent is hollow leaving the violations averred in the petition and supported in the Affidavit of the Petitioner largely unanswered.

38. The Court therefore finds the following matters to have been proven on a balance of probability by the Petitioner;

- i. That on 11th March, 2003 the Petitioner was sent on compulsory leave indefinitely without any show cause notice.
- ii. The Petitioner remained on compulsory leave and was not afforded any hearing nor given reasons for his prolonged stay on compulsory leave until 21st November, 2003 when the Petitioner was formally replaced as Principal of the 1st Respondent.
- iii. That the remuneration of the Petitioner was stopped with effect from October 2003, abruptly and without notice and all other benefits were withdrawn by December, 2003.
- iv. That the Petitioner was not paid any terminal benefits he was partly paid on 6th December, 2005. The Petitioner was therefore subjected to extreme hardship described in the petition which amounted to degrading and inhuman treatment.
- v. The Petitioner has been denied payment of the full terminal benefits contained in a letter by the 1st Respondent dated 21st April, 2004. In the letter the 1st Respondent had computed the full terminal benefits of the Petitioner in the sum of Kshs 5,227,028.46. The Petitioner has established that to date he has only been paid Kshs 2,667,072.05 leaving a balance of Kshs 2,559,991.41.

39. The Respondent in the Replying Affidavit, has not justified the failure not to pay the balance of benefits due and owing to the Petitioner.....the 1st Respondent provided a different computation of the dues owing to the Claimant.

40. In the final analysis, the court finds that the violations enumerated by the Petitioner in his petition to be proven on a balance of probability and makes the following order;

- i. Declares that by terminating and/or suspending the Petitioner from his employment without any notice of wrongdoing and according the Petitioner the opportunity to be heard, the Respondent infringed the Petitioner's right to a fair hearing and due process.
- ii. Declares that by denying the Petitioner remuneration as well as terminal benefits for an inordinately long period of time, the Respondents violated the Petitioner's rights and livelihood under Section 57(1) and subjected him to inhuman and degrading treatment contrary to Section 74 (1) of the Constitution of Kenya 1969. This was also a breach of the Petitioner's right to property protected under Section 75 of the erstwhile Constitution.
- iii. Accordingly, the court directs the 1st Respondent to pay to the Petitioner the balance of computed terminal benefits in the sum of Kshs 2,559,991.41 with interest at court rates from 21st April, 2004 until payment in full.
- iv. The court directs the 1st Respondent to pay the Petitioner the equivalent of 12 months gross salary as compensation for the violations of the Petitioner's rights set out in the judgement which effectively resulted in the loss of employment and remuneration to the Petitioner for a considerable period of time between November 2007 for no valid reason and without affording the Petitioner any fair hearing. This is to mitigate the hardships and the degrading and inhuman treatment the Petitioner faced during that period as outlined in the petition. The 1st Respondent is directed to compute the award serve and file within 30 days of this judgment. The Petitioner to confirm the computation within 14 days from date of service to enable the court to consider and confirm the same.
- v. The award in (iv) is payable with interest at court rates from date of judgment till payment in full.

The court has not found it appropriate to award payment in lieu of leave days and balance of pension dues because these ought to have been included in the computation made on 21st April, 2004.

Furthermore Petitioner has indicated that he was re-deployed on 12th September, 2007 though no details of re-deployment were provided in the petition.

vi. The Petitioner is awarded costs of the suit.

Dated and Delivered at Nairobi this 19th day of June 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE