



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO 37 OF 2013**

**PAUL MASINDE SIMIDI.....PETITIONER**

**VS**

**NATIONAL OIL CORPORATION OF KENYA.....1ST RESPONDENT**

**SUMAYYA ATHMAN HASSAN.....2ND RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioner, Paul Masinde Simidi is a former Internal Audit Manager of the 1st Respondent, National Oil Corporation of Kenya. The 1st Respondent is a state corporation charged with the stabilisation of oil supply and prices in Kenya. The 2nd Respondent, Sumayya Athman Hassan was at all material times the Managing Director/ Chief Executive Officer of the 1st Respondent.

**The Petition**

2. The Petitioner states that he was employed by the 2nd Respondent in the position of Internal Audit Manager on a three year renewable contract, effective 18th October 2006. He was confirmed in his appointment by letter dated 25th September 2007. The Petitioner was functionally responsible to the 1st Respondent's Board of Directors and its Audit Committee while maintaining an administrative reporting line to the 2nd Respondent.

3. The Petitioner's duties and responsibilities included evaluation of the effectiveness of the 1st Respondent's internal controls, risk management and governance processes.

4. The Petitioner avers that his performance was regularly appraised by the 1st Respondent and he was rated very highly.

5. On 19th November 2009, the Petitioner's contract was renewed for a further three years. In the renewal letter, the Petitioner was added the responsibility of Risk Management as well as chairing the Corruption Prevention and Integrity Committee (COPIC).

6. On 24th November 2010, the Petitioner, in the course of his duties, prepared and submitted an internal audit report to the Board Audit Committee. In the said report, the Petitioner cited the 1st

Respondent's non compliance with the provisions of the Public Procurement and Disposal Act, 2005 and the Regulations thereunder with respect to procurement, receipt and inventory management of oil products and acquisition of petrol stations from Total Kenya Limited.

7. On 25th March 2011, the Petitioner prepared and submitted another internal audit report to the 1st Respondent's Board Audit Committee in which he highlighted an irregular payment of Kshs. 967,260 to Reliable Concrete Limited and other irregular payments to various contractors in the sum of Kshs. 2,662,200 plus a further sum of Kshs. 116,830 being retention money paid to Mass Petroleum Limited.

8. The Petitioner also raised the issue of contract variation at the rate of 187% of the original contract on account of Prowalo Co. Limited. The Petitioner further raised lack of cost leadership in the Operations Department and a litany of alleged corruption cases within the 1st Respondent's establishment. The Petitioner states that on 29th March 2013 he submitted all the corruption cases to the Kenya Anti-Corruption Commission.

9. On 23rd May 2011, the Petitioner received a first warning raising the following accusations:

- a) Breach of confidentiality and integrity;
- b) Leakage of confidential/vital company information to unauthorised persons;
- c) Revealing details of whistle blowers;
- d) Breach of professional ethics;
- e) Victimization of employees through reactive audits;
- f) Witch hunting;
- g) Intimidation of staff;
- h) Abuse of office;
- i) Threatening employees with punitive actions;
- j) Causing fear and anxiety in the company;
- k) Contributing to staff exists.

10. On 6th June 2011, the Petitioner received a second warning accusing him of unauthorised absence from the office. The Petitioner responded to this warning on 8th June 2011 and on 9th June 2011, he reported threats on his life and recorded a statement at the Criminal Investigations Department (CID) Headquarters. On 13th June 2011, the Petitioner requested the Kenya Anti-Corruption Commission for protection as a whistle blower and on 15th June 2013, his employment contract was terminated without notice and without reason.

11. The Petitioner states that on 20th June 2011, the 1st Respondent's Board of Directors discussed the termination and directed the 2nd Respondent to furnish the Petitioner with detailed reasons for the termination to which the Petitioner was to respond. On 23rd June 2011, the Petitioner requested the 2nd Respondent to provide all information and documents supporting the allegations against him but the 2nd Respondent declined. On the same day, the Petitioner submitted to the 1st Respondent's Board a detailed statement of what he perceived to be the reasons for the termination of his contract.

12. The Petitioner goes on to state that on 1st July 2011, the Ethics and Anti-Corruption Commission protested his termination and demanded reinstatement.

13. In response to the protest by the Ethics and Anti-Corruption Commission, the 1st Respondent's Board rescinded the termination and substituted it with a retroactive interdiction effective 15th June 2011.

14. The interdiction letter accused the Petitioner of gross misconduct and misdemeanour particulars being; breach of confidentiality, leakage of confidential information to the media, absence from duty without authority and forgery. The Petitioner was required to respond to the allegations within fourteen days which he did by letter dated 1st August 2011.

15. On 4th August 2011, the Petitioner was summoned by the Inspector-General of State Corporations for an interview on 8th August 2011. At this interview, the Petitioner was asked to exculpate himself from corruption allegations made against him by the 2nd Respondent. On 11th August 2011, the Petitioner presented a written memorandum to the Inspector-General of State Corporations.

16. By his letters dated 11th April 2012 and 8th June 2012 the Petitioner asked the Respondents to update him on the status of his interdiction and the 1st Respondent's Board resolutions thereon. The Respondents did not respond to the Petitioner's inquiries.

17. On 30th July 2012, the Petitioner tendered his resignation from the position of Internal Audit Manager. He states that his resignation was motivated by the need to mitigate his financial ruin and psychological suffering. The Petitioner pleads that the Respondents have refused to acknowledge his resignation and to pay him his terminal dues.

18. It is the Petitioner's case that the Respondents have violated his fundamental rights and freedoms and contravened the Constitution by:

a) Un-procedurally serving the Petitioner with warning letters without giving him an opportunity to be heard or to exculpate himself from the accusations; the Respondents have thus violated the Petitioner's freedom from cruel treatment, psychological torture, right to human dignity, right to equal protection and benefit of the law, right to fair labour practices and the right to fair administrative action guaranteed under Articles 19, 20(1) & (2), 21(3), 24, 25(a), 27(1), (2), (3) & (5), 28(d) & (f), 41(1) & (2)(b), 47 (1), 50(1) and 236 of the Constitution of Kenya, 2010 read together with Section 5(2) & (3)(b) and 76 of the Employment Act, 2007;

b) Terminating the Petitioner's contract of service without notice or giving the Petitioner an opportunity to be heard; the Respondents thereby contravened the Petitioner's right to enjoyment of unlimited fundamental rights, right to the protection and enjoyment of legal protection, right to information, right to fair hearing and resolution of the dispute by an impartial party guaranteed under Articles 19, 20(1) & (2), 21(3), 24, 25(c), 27(1), 28, 29 (d) & (f), 33(1)(a), 35(1)(b) & (2), 41 (1) & (2) (b), 47(1) & (2), 50(1) & (2)(a),(b),(j),(k), 232(1)(c),(e) and 236 of the Constitution of Kenya, 2010 read together with Sections 35(2), 41 and 44(2) & (4) of the Employment Act, 2007;

c) Failing to pay the Petitioner his terminal dues and gratuity immediately upon his resignation; the Respondents thereby contravened the Petitioner's right to property guaranteed under Article 40(1)(a) of the Constitution of Kenya, 2010;

d) Victimising the Petitioner for performing his duties within the law and the Constitution of Kenya, 2010; the Respondents thereby violated Article 236 of the Constitution.

19. The Petitioner seeks the following declarations in relation to himself and in relation to the public interest:

a) A declaration that all times he was and is still entitled to the full unlimited enjoyment of the rights and fundamental freedoms guaranteed under Articles 19, 20(1) (2) & (4), 21(3), 24 (1) & (3), 25(a) & (c), 27(1), (2), (3) & (5), 28, 29(d) & (f), 35(1) (b) & (2), 41(1) & (2) (a) & (b), 46(1)(c), 47(1) & (2), 50(1) and 236 of the Constitution of Kenya, 2010;

- b) A declaration that at all times he was and is still entitled to the full unlimited enjoyment of the labour rights secured under Sections 5(1), (2), (3), (4), (5) & (6), 9(2) & (3), 10(1), (2) & (5), 35(2) & (4)(a), 36, 41, 43, 44(2) & (4), 45, 47(3) & (5), 49, 50, 51, 74, 75 and 87 of the Employment Act, 2007;
- c) A declaration that at all times he was and is still entitled to the full unlimited enjoyment of the administrative rights and benefits afforded by the disciplinary and separation procedures as stated in the 1st Respondent's Human Resources Management Policies and Procedures Manual;
- d) A declaration that at all times the Respondents were and are still bound by the duties and obligations and the values and principles under Articles 2(1) & (4), 3(1), 10, 19, 20(1), (2) & (4), 21(3), 24(1), 25(a) & (c), 27(1), (2), (3) & (5), 28, 29(d) & (f), 33(1)(a), 35(1)(b) & (2), 41(1), (2) (a) & (b), 46(1)(c), 47(1) & (2), 50(1) & (2)(a),(b),(c),(f),(j) & (k), 73(2), 232(1)(a),(c),(d),(e),(f),(i) & (2)(b) and 236 of the Constitution of Kenya, 2010;
- e) A declaration that at all times the Respondents were and are still bound by the duties and obligations under Sections 5(1),(2),(3),(4),(5) & (6), 9(2) & (3), 10(1),(2) & (5), 35(2) & (4)(a), 36, 41, 43, 44(2) & (4), 45, 47(3) & (5), 49, 50, 51, 74, 75 and 87 of the Employment Act, 2007;
- f) A declaration that at all times the Respondents were and are still bound by the ethical duties and obligations under Sections 8, 9(a),(b),(c),(d) & (g),10, 17, 18, 19, 22(a) and 24 of the Public Officer Ethics Act, 2003;
- g) A declaration that the Respondents have contravened the Petitioner's rights and fundamental freedoms guaranteed under Articles 19, 20(1),(2) & (4), 21(3), 24(1) & (3), 25(a) & (c), 27(1),(2), (3) & (5), 28, 29(d) & (f), 35(1)(b) & (2), 41(1) & (2)(a) & (b), 46(1)(c), 47(1) & (2), 50(1) and 236 of the Constitution of Kenya, 2010 and their acts or omissions are unconstitutional, invalid and void and of no effect;
- h) A declaration that the Respondents have violated the duties and obligations and the values and principles under Articles 2(1) & (4), 3(1), 10, 19, 20(1),(2)&(4), 21(3), 24(1), 25(a)&(c), 27(1),(2), (3)&(5), 28, 29(d)&(f), 33(1)(a), 35(1)(b)&(2), 41(1),(2)(a)&(b), 46(1)(c), 47(1)&(2), 50(1)&(2) (a),(b),(c), (e),(f),(j)&(K), 73(2), 232(1)(a),(c),(d),(e),(f),(i) & (2)(b) and 236 of the Constitution of Kenya, 2010 and their acts or omissions are unconstitutional, invalid and void and of no effect;
- i) A declaration that the Respondents have violated the duties and obligations under Sections 5(1), (2),(3),(4),(5) & (6), 9(2)&(3), 10(1),(2)&(5), 35(2)&(4)(a), 36, 41, 43, 44(2)&(4), 45, 47(3)&(5), 49, 50, 51, 74, 75 and 87 of the Employment Act, 2007;
- j) A declaration that the Respondents have violated the ethical duties and obligations required of them under Sections 8, 9(a),(b),(c),(d) & (g),10, 17, 18, 19, 22(a) and 24 of the Public Officer Ethics Act, 2003;
- k) A declaration that the termination of the Petitioner's contract of service contravened the Petitioner's right to fair labour practices and right to fair trial guaranteed under Articles 41, 50(1) and 236 of the Constitution of Kenya, 2010 and the said termination is therefore unconstitutional, invalid, illegal, null and void and of no effect;
- l) A declaration that the termination of the Petitioner's contract of service is in effect an unfair and unlawful termination;
- m) A declaration that the petition herein is also in public interest;
- n) A declaration that having contravened the Petitioner's rights and fundamental freedoms and having violated the Constitution of Kenya, the Respondents are now unfit and unsuitable to hold or to continue holding public office in Kenya and ought to be retired from public service in public

interest;

o) A declaration that the Petitioner was and is still entitled as against the Respondents and all persons to the protection of his fundamental rights and freedoms including but not limited to fair labour practices, freedom from discrimination, equal protection and benefit of the law, human dignity, security of the person, freedom of expression, access to information, right to property, fair administrative action and fair hearing enshrined in the Bill of Rights and which apply to all persons and bind all persons.

20. Consequently, the Petitioner seeks an order that judgment be entered in his favour as follows:

a) An order that his interdiction and summary dismissal by the Respondents was in violation of the Constitution of Kenya, the Employment Act, 2007 and the Public Officer Ethics Act, 2003 and is therefore unconstitutional, illegal and invalid;

b) An order that the Respondents do pay general damages and compensation for contravening the Petitioner's rights and fundamental freedoms secured in the Bill of rights;

c) Kshs.2,404,112 being terminal benefits made up of:

i) Half salary (16th June -30th July 2012)...Kshs.1,667,250.00

ii) Accrued leave as at 16th April 2012.....140,177.50

iii) Gratuity (21st November, 2009 – 16th April, 2012)  
.....1,028,934.50

Less refund (16th April-30th July 2012).....(432,250.00)

d) An order that the Respondents do issue the Petitioner with a certificate of service;

e) An order that the Respondents do pay the Petitioner the costs of this petition plus interest.

## **The Response**

21. The Respondents' response to the petition is contained in a replying affidavit sworn by the 1st Respondent's Acting Human Resource Manager, Cecilia Kalungu on 30th January 2014. She depones that the 2nd Respondent is an unnecessary party in these proceedings as she at all material times represented the 1st Respondent who was the Petitioner's employer.

22. Kalungu further depones that the Petitioner was employed by the 1st Respondent on a three year renewable contract effective 18th October 2006. The Petitioner's employment contract provided that any confidential information in the employee's possession must be treated as such and should not be divulged without proper authorisation. The contract further provided that the Petitioner would be required to comply with the policies of the 1st Respondent.

23. The Petitioner's employment was confirmed on 25th September 2007 in accordance with the terms of the employment contract and on 19th November 2009, the contract was renewed for a further period of three years running from 21st November 2009 to 20th November 2012.

24. The terms of the renewed contract also provided that as a condition of employment, any confidential information which may come into the possession of the Petitioner by virtue of his employment with the 1st Respondent may not be divulged to third parties without proper authorisation.

25. Kalungu goes on to depone that although the Petitioner prepared internal audit reports as part of his employment obligations, the contents of the said reports, adoption and implementation thereof remained

part of the 1st Respondent's internal processes and the reports were to be interrogated and scrutinised for accuracy and veracity before being acted upon.

26. Kalungu states that during the Petitioner's employment, the 1st Respondent received several complaints from other employees on the conduct of the Petitioner in carrying out his duties of internal audit. The complaints were to the effect that the Petitioner was revealing the identities of whistle blowers contrary to the terms of his employment. The Petitioner's conduct caused suspicion, friction and conflict among employees of the 1st Respondent.

27. Upon receipt of these complaints, the 1st Respondent wrote to the Petitioner expressing concern over the complaints and breaches committed by the Petitioner. Kalungu also states that on 26th and 27th May 2011, three days after the 1st Respondent's letter, the Petitioner absconded duty. On 6th June 2011, the 1st Respondent wrote to the Petitioner notifying him that his failure to report to work amounted to absconding duty without leave or lawful cause.

28. Upon consideration of the breaches and having warned the Petitioner, the 1st Respondent terminated the Petitioner's contract of employment from 15th June 2011. After a meeting of the 1st Respondent's Board held on 20th June 2011, it was decided that the decision to terminate the Petitioner's employment be rescinded and instead, the Petitioner was interdicted pending further interrogation.

29. While on interdiction, the Petitioner sought employment with Wananchi Group in March 2012 where he was confirmed as Group Internal Auditor as per letter dated 16th July 2012. According to Kalungu, by the time the Petitioner sought to resign from the 1st Respondent's employment on 30th July 2012, he had long secured and taken up another employment.

30. The Respondents deny that the Petitioner's constitutional rights were violated. In addition, they state that many of the allegations made by the Petitioner are not related to his employment with the 1st Respondent.

### **Findings and Determination**

31. The following are the issues for determination before the Court:

- a) Whether the actions complained of amount to a violation of the Petitioner's constitutional rights;
- b) Whether the 2nd Respondent is properly joined in these proceedings;
- c) Whether the Petitioner is entitled to the remedies sought.

### **Breach of Constitutional Rights**

32. By his petition, the Petitioner raises several breaches of his constitutional rights.

33. As held in the well known case of *Anarita Karimi Njeru v R [1979] KLR 124*, a party alleging violation of a constitutional right or freedom must first; state with reasonable precision the right or freedom in issue and second; describe how the right or freedom has been violated.

34. The Petitioner alleges broad violation of his constitutional rights and freedoms ranging from freedom from cruel treatment to the right to fair labour practices. In addition, the Petitioner cites instances of violation of the Constitution and the law by the Respondents.

35. I have examined this petition in line with the holding in the *Anarita Karimi Njeru Case*, which remains good law, and find that only the complaint on violation of the right to fair labour practices merits examination by this Court.

36. On 15th June 2011, the 2nd Respondent issued the following letter to the Petitioner:

“Dear Paul,

**RE: TERMINATION OF EMPLOYMENT**

*The Corporation has decided to terminate your employment services with immediate effect.*

*As stipulated in your contract renewal letter dated 19th November 2009, under the “termination of contract” clause, the Corporation will pay you one month's salary in lieu of notice.*

*You are advised to hand over your current responsibilities to the Internal Auditor-Technical Services.*

*Yours sincerely,*

*(Signed)*

SUMAYYA HASSAN-ATHMANI

**MANAGING DIRECTOR”**

37. It would appear that at the time the termination letter was issued, the Petitioner was assisting the Kenya Anti-Corruption Commission with investigations into alleged procurement irregularities at the 1st Respondent. The then Director/Chief Executive Officer of the Anti-Corruption Commission, Prof. PLO Lumumba therefore wrote to the 2nd Respondent on 1st July 2011 advising her that the action to terminate the Petitioner's employment while he was assisting the Commission with investigations was in violation of the law.

38. The termination of the Petitioner's employment was rescinded by letter dated 18th July 2011 which also interdicted the Petitioner on allegations of breach of confidentiality, absenteeism and forgery effective 15th June 2011. Significantly, these were the same allegations that had led to the termination of the Petitioner's employment.

39. In his letter to the 2nd Respondent dated 1st July 2011, Prof. Lumumba cited Section 65 of the Anti Corruption and Economic Crimes Act, No. 3 of 2003 which provides that:

***“No action or proceeding, including a disciplinary action, may be initiated or maintained against a person in respect of assistance given by the person to the Commission or an investigator; or a disclosure of information made by the person to the Commission or an investigator”***

40. Unlike suspension which is a neutral action taken to facilitate unfettered investigations, interdiction is a disciplinary action especially because part of the salary of an employee on interdiction is withheld. It follows therefore that if the termination of the Petitioner's employment was unlawful by dint of the Anti Corruption and Economic Crimes Act No. 3 of 2003, the interdiction was equally unlawful.

41. Moreover, prior to the interdiction, the Petitioner was not subjected to the mandatory disciplinary procedure set out in Section 41 of the Employment Act, 2007. As held by **Rika J** in **GMV v Bank of Africa Kenya Limited [2013] eKLR**, the requirements of Section 41 are minimum employment standards which must be read into all contracts of employment.

42. The allegations made against the Petitioner by the Respondents bordered on gross misconduct and the Court was unable to understand why he was not taken through the internal disciplinary process set out in law and the 1st Respondent's internal rules.

43. The Court noted numerous inquiries made by the Petitioner on the status of his interdiction which elicited no response from the Respondents. No explanation was given for the Respondents' failure to respond to the Petitioner's inquiries.

44. According to the minutes of the 1st Respondent's Board meeting held on 15th December 2011, which were produced pursuant to an order of this Court issued on 26th June 2015, at **MIN. NO. 10/15/12/11 UPDATE ON MR. PAUL SIMIDI'S CASE** the Board resolved that:

***“Mr. Paul Simidi be reinstated to the employment of the Corporation.”***

45. The issue was also discussed and reiterated at a special meeting of the Human Resource Board Committee held on 14th May 2012 whose minutes were produced pursuant to the Court order aforementioned (see **MIN/04/05/12: CURRENT VACANT POSITIONS at 5.6**).

46. There was no evidence that the decision to reinstate the Petitioner was ever rescinded and there was no explanation why the Respondents failed to implement their own decision.

47. In their reply to the Petition, the Respondents have rehashed the complaints made against the Petitioner through various letters issued to him either by way of warnings, interdiction or termination.

48. Yet, these issues were canvassed both at the Corporation level and at the State Corporations Inspectorate level with the final verdict being that the Petitioner be reinstated. It is as if the Respondents are asking the Court to re-open the Petitioner's disciplinary case and perhaps reach a different verdict. That is not within the province of this Court whose role is to examine disciplinary processes and action at the work place, with the Constitution and the law being the benchmark.

49. Whatever motivated the Respondents to disobey their own decisions, this is a classic case of corporate governance thrown out of the window and a hapless employee caught in the mix. This is a mark of impunity in a public body which must be firmly discouraged.

50. From the evidence availed to the Court, the Petitioner remained on interdiction from 15th June 2011, the date of the rescinded termination until 30th July 2012, when he resigned. It was submitted on behalf of the Respondents that arrangements were being made to reinstate the Petitioner when he resigned in haste.

51. The Court was not told what manner of arrangements took one year to put in place and it was not clear what the Petitioner, who was on half pay was expected to do within that one year. The only thing I will say on this score is that to keep an employee on interdiction for as long as one year amounts to constructive dismissal and is an unfair labour practice within the meaning of Article 41 of the Constitution.

52. Constructive dismissal was defined by **Mbaru J** in ***Emmanuel Mutisya Solomon Vs Agility Logistics (Industrial Court Cause No 1448 of 2011)*** as:

***“a situation in the workplace which has been created by the employer, and which renders the continuation of the employment relationship intolerable for the employee to such an extent that the employee has no other option available but to resign.”***

53. To my mind, the situation created by the Respondents in the instant case fits the above description of constructive dismissal and it is my finding that the Petitioner did the right thing to mitigate his losses and move on. The issue of the timing of his resignation vis a vis his taking up his new appointment at Wananchi Group is a matter I will consider in assessing the damages payable to the Petitioner.

### **Joiner of the 2nd Respondent**

54. In the replying affidavit sworn by Cecilia Kalungu, it is deponed that the 2nd Respondent, Summaya Athmani Hassan who was at all material times, the Managing Director/Chief Executive Officer of the 1st Respondent, is not properly joined in these proceedings. The reasoning is that whatever actions she took were within her official capacity.

55. In *Nicholas Mwenda Mtwaruchiu and 7 Others v Ethics and Anti Corruption Commission and 3 Others [2014] eKLR* this Court held that joinder of officers of corporate bodies acting in their official capacity is to be discouraged. This cover does not however apply where an officer goes on a lone ranger mode, ignoring decisions made at the corporate level. In my view, a Chief Executive Officer who fails to implement the lawful decisions of the Board and its committees cannot claim the corporate cover. From the evidence on record, the 2nd Respondent not only took the actions complained of but also failed to implement corrective action as determined by the Board. It seems to me therefore that she bears specific and unique responsibility for the wrongs meted against the Petitioner. The conclusion is that she is properly joined in these proceedings.

### **Remedies**

56. In light of the foregoing I enter judgment in favour of the Petitioner and against the 1st and 2nd Respondents in the following terms:

- a) Kshs.3,000,000 in general damages;
- b) Terminal benefits to be tabulated and agreed upon by Counsels for the parties within the next 30 days from the date of this judgment, with the caveat that no payment shall be made for the period after 16th April 2012 when the Petitioner took up employment with Wananchi Group;
- c) An order that the Respondents issue the Petitioner with a certificate of service;
- d) An order that the Respondents pay the costs of this petition.

57. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS  
30TH DAY OF NOVEMBER 2015**

**LINNET NDOLO**

**JUDGE**

### **Appearance:**

Mr. Mungla for the Petitioner

Mr. Nyaburi for the Respondents