



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

PETITION NO. 5 OF 2014

RICHARD HAYWOOD ONDIKO.....PETITIONER

- VERSUS -

GEOHERMAL DEVELOPMENT COMPANY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 20th June, 2014)

JUDGMENT

The petitioner **Richard Ondiko Haywood** filed the petition on 12.03.2014 through Kiplenge & Kurgat Advocates. The petitioner prayed that the honourable court be pleased to make orders as follows:

- a. **Issue an order declaring that the termination of employment of the petitioner and the manner in which he was treated by the respondent amounted to a violation of the fundamental rights and freedoms of the petitioner enshrined in the Constitution.**
- b. **An award of damages to the petitioner for violations of the petitioner's fundamental rights and freedoms.**
- c. **An order for payment of the petitioner's terminal benefits as follows:**
 - i. **salary in lieu of notice;**
 - ii. **12 months salary as compensation for illegal termination;**
 - iii. **Kshs.120,000.00 being house allowances of Kshs.5,000.00 per month for two years; and**
 - iv. **two months' salary as leave days for two years**
- d. **Certificate of service.**
- e. **Costs of the petition.**

The respondent Geothermal Development Company Limited entered appearance on 02.04.2014 through Sichangi Partners Advocates and filed on 30.04.2014, the replying affidavit of Robert Kimondo, the respondent's Human Resource Officer, to oppose the petition.

The petitioner's case is that he was employed by the respondent orally in January, 2011. The petitioner was a person with disability so that he was deployed to perform lighter duties of keeping records at the stores and fuelling department. The duties did not entail much physical exertion or energy and in such circumstances, the claimant's case was that he performed satisfactorily without performance complaints by the respondent.

The claimant's case is that about 26.04.2011, the respondent unilaterally required the petitioner to sign the contract dated 4.04.2011 and the petitioner complied. The contract was back-dated to be effective from 31.01.2011 without any explanation. The petitioner's further case was that in June 2012, without regard to the petitioner's disability and in violation of the petitioner's constitutional rights, the respondent transferred the petitioner to a department which required a lot of physical energy to perform the duties.

Consequently, by reason of the unfair transfer, the petitioner's case is that he was unable to perform and in December 2012, the petitioner's services were verbally terminated on account of poor performance. There was no termination notice and the petitioner's case was that the termination was discriminatory, illegal and unconstitutional and in particular, the respondent contravened Articles 27(5) on freedom from discrimination, 41 on the right to fair labour practices, 47 on fair administrative action and 28 on human dignity as provided in the Constitution.

The respondent's case is that the petitioner was employed by the respondent in May, 2011 and the petitioner served throughout 2011 and the respondent paid the petitioner all the due remuneration. The respondent's further case was that in 2012, the petitioner's contract was renewed for three months being January to March, 2012 and thereafter, the petitioner stopped working for the respondent because the contract lapsed and was not renewed. The respondent pleaded that the termination being by lapsing of the contract, the petitioner was not entitled to termination notice and the respondent did not breach any of the petitioner's rights as alleged.

The issues for determination are whether the petitioner was discriminated on account of disability and whether the petitioner is entitled to the remedies as prayed for.

The petitioner has stated in his affidavit at paragraph 5 that he is a person with disability. At paragraph 10 of the affidavit, he states he was in June, 2012 deployed to a department requiring a lot of physical energy and exertion in discharging duties. First, in absence of any further evidence, it is impossible for the court to tell the nature and extent of the physical disability as stated by the petitioner and how it impacted upon his performance of duties as assigned. Secondly, it is not clear to the court the nature of duties and the department to which the petitioner was redeployed which the petitioner says required a lot of energy. Thirdly, it is not by evidence established, on the part of the petitioner, the assignments that were in issue, the performance levels that were expected and therefore the poor performance that would be attributable to the disability status. Fourthly, the circumstances surrounding the verbal termination were not established by way of evidence. Accordingly, the court finds that taking all the material on record into account, the petitioner has failed to establish the contravention of the constitutional rights and freedoms as alleged.

The court has carefully considered the pleadings, the affidavits and the submissions and finds that the nature of dispute in the instant case were better commenced by way of an ordinary action where oral evidence by the parties would have helped to bring out the real issues in dispute. As matters have turned out to be, the court finds that the petitioner has failed to establish the claims as made and the prayers made in the petition will therefore fail.

In conclusion, the petition is dismissed with costs.

Signed, dated and delivered in court at **Nakuru** this **Friday 20th June, 2014**.

BYRAM ONGAYA

JUDGE