



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAKURU**

**CAUSE NO. 439 OF 2013**

**ROBERT MBOYA NYARINGO.....CLAIMANT**

**-VERSUS-**

**KENYA FOREST SERVICE.....1<sup>ST</sup> RESPONDENT**

**PRINCIPAL, KENYA FORESTRY COLLEGE.....2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 26th September, 2014)

**JUDGMENT**

The claimant filed the memorandum of claim on 16.12.2013 through J.O. Soire & Company Advocates. The claimant prayed for judgment against the respondents for:

- a. The decision by the respondents herein not to accord and afford the claimant the right to observe his Sabbath day from Friday Sunset to Saturday Sunset and compel him to attend training and programmes on Saturday was unconstitutional, improper and unlawful.
- b. That a declaration that the decision by the 1<sup>st</sup> respondent to mete out a demotion vide letter dated 18<sup>th</sup> July 2013 was improper, unlawful, wrongful and oppressive.
- c. That the respondents herein be condemned to pay general damages for the unlawful, improper and wrongful decisions against the claimant.
- d. Costs of the suit.

The respondents filed the response to memorandum of claim on 27.02.2014 through Odhiambo & Odhiambo Advocates. The respondents prayed that the court finds that the disciplinary action meted on the claimant was lawful and unfair and affirms the demotion. The respondents further prayed that the suit be dismissed and costs awarded to the respondents. A reply to the response was filed on 12.03.2014. The amended response to memorandum of claim was filed on 18.03.2014 and the respondents' prayers were repeated.

The claimant gave evidence to support his case. The respondents' 1<sup>st</sup> witness was Peter Waweru (RW1), the 1<sup>st</sup> respondent's deputy principal at the Kenya Forest College at Londiani and the 2<sup>nd</sup> witness was David Gogo (RW2), the 1<sup>st</sup> respondent's senior human resource officer.

The claimant was employed by the 1<sup>st</sup> respondent as an assistant lecturer and deployed at the respondent's college at Londiani. The claimant was employed on 11.03.2011 and reported on duty on 3.05.2011.

In December 2012, the claimant was identified to attend the paramilitary training at the 1<sup>st</sup> respondent's paramilitary training school at Londiani. The claimant accepted the nomination and reported for the training as scheduled. The course joining instructions called Course Standing Orders and Regulations provided for the conduct expected of all the course participants. Previously, the course had been run 6 days per week inclusive Saturdays.

The claimant was a seventh day Adventist whose religious belief and conviction entailed observing the Sabbath day running from every Friday at sunset to Saturday at sunset. He also served as a church elder. Accordingly, in view of the looming nomination to attend the training, the claimant wrote the letter dated 12.10.2012 addressed to the 1<sup>st</sup> respondent's director and through the 2<sup>nd</sup> respondent. The claimant requested in the letter that he be exempted from the training as from every Friday sunset to Saturday sunset for worship as it was one of the fundamental believes of his seventh day Adventist church. To support the request for exemption, the claimant cited in the letter his freedom of religion and to observe his day of worship as provided for in Article 32 of the Constitution of Kenya, 2010. The Article provides as follows:

1. Every person has the right to freedom of conscience, religion, thought, belief and opinion.
2. Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.
3. A person may not be denied access to any institution, or the enjoyment of any right, because of the person's belief or religion.
4. A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion.

The claimant reported for the course on 30.12.2012 at 5.00 pm and he was one hour late together with several other participants. On 1.01.2013, the claimant was punished to push a worn out lorry tyre from 11.00 am to 4.00 pm. On 5.01.2013, the claimant stayed in the school compound dressed in uniform but did not report for instructions because it was a Saturday and therefore the claimant's Sabbath day. At 10.00 am, the school's commandant summoned the claimant and told the claimant to leave the school premises and to report to the 1<sup>st</sup> respondent's human resource officer at Nairobi. The claimant went to Nairobi and reported as directed about 7<sup>th</sup> or 8<sup>th</sup> January 2013 and held a meeting with the senior deputy director finance and administration who instructed the claimant to report at his work place in Londiani. The claimant complied and reported at work on 10.01.2013 and resumed work as usual.

On 12.03.2013, the claimant received an interdiction letter dated 11.02.2013. The accusations leveled against the claimant in the letter included reporting for the paramilitary course on 30.12.2012 at 1700 hrs being 1 hour 20 minutes late; not attending classes on Saturday 5.01.2013; and failing to comply with the orders to put on the uniform and to join other participants for lessons on 5.01.2013. The interdiction letter charged that the claimant's conduct amounted to gross misconduct and his explanation was invited within 14 days with effect from the date of the letter. While on interdiction, the claimant was to be on half pay.

The claimant replied by his letter dated 12.03.2013. His explanation was that the issue of lateness had been conclusively handled by the school commandant. On the 2<sup>nd</sup> charge, the claimant stated that he had requested to be exempted from Saturday instructions on account of his religion and the course joining instructions stated training would be for 5 days from Monday to Friday so that he considered that his earlier request for exemption as per his letter of 12.10.2012 had been answered positively. His further explanation was that the programme issued by the school included training on Saturdays and he invoked the school's internal procedures to be exempted as earlier expected but the school commandant rejected the request. The claimant's case was that he would cover for the lost time on Sundays because it was a free day. The claimant pleaded that the commandant had directed him to leave the school and he had no option but to comply. The claimant subsequently received the letter titled "**Demotion for Gross Misconduct**" dated 18.07.2013 conveying the 1<sup>st</sup> respondent's decisions thus:

- a. That the claimant be demoted from the position of assistant lecturer KFS Grade 9 to the position

of assistant lecturer KFS Grade 10 with effect from 23<sup>rd</sup> April, 2013. The claimant's salary would be Kshs.45,200.00 and to adopt 1.05.2014 as his incremental month. The other benefits would apply as per the remuneration structure applicable to the claimant's grade.

- b. The claimant be issued with the first warning letter.
- c. That the claimant undertakes the course at his own cost.

The claimant was dissatisfied and he appealed to the 1<sup>st</sup> respondent's board on grounds that his case related to contravention of his fundamental rights and freedoms and no misconduct had been established against the claimant. The claimant as at the date of the hearing of the suit had not received any response to the appeal. The claimant resumed duties as demoted and continued to perform his duties as an assistant lecturer. Since end of February 2013 and as at the hearing of the suit the claimant had not been paid full monthly pay. He was on half pay as per the pay slips on record. At grade KFS 9, the pay was Kshs.51,800.00 and the Kshs.45,200.00 was for grade KFS 10.

The claimant testified that he converted to seventh day Adventist about in 1984 and was baptized in 1986 and re-baptized in 2003. It was his testimony that under his faith he must observe the Sabbath day as a holy day sanctified by God and dedicated to God. The claimant denied that he appeared at the sporting fields on Saturdays. It was the claimant's testimony that he dedicated all Saturdays to Sabbath.

RW1 testified that the claimant was the sports master and he attended sports' meetings including on Saturdays. RW1 also testified that the respondents exempted Muslims from extraneous activities as per their request during the holy month of Ramadan. RW1 further stated that the claimant was attending the training voluntarily. RW1 also testified that the paramilitary school commandant had authority to impose punishments for all the misconduct at the school. RW1 further testified that the commandant was required to follow due process to discontinue the training but the applicable procedures were not known to RW1. Thus, RW2 stated that the claimant should have addressed the letter requesting for exemption to the school commandant. RW2 also testified that the claimant's salary had been retained at Kshs.51,800.00 and the withheld pay released as per the pay slip for May 2014 being exhibit R1(c). RW2 testified that the decision to demote had not been effected awaiting the decision by the board.

The court has considered the pleadings, the evidence and the submissions on record. The court makes the following findings on the issues in dispute.

The **1<sup>st</sup> issue** for determination is whether the claimant belonged to the seventh day Adventist church and faith. The court has considered the evidence by the claimant and finds that there is no doubt that he belonged to the seventh day Adventist church. He was baptized and he was a church elder and there is no material before the court to doubt that he belonged to that faith.

The **2<sup>nd</sup> issue** for determination is whether it has been established that the claimant as a seventh day Adventist was by his religion required not to work on Sabbath day as a holy day in his faith. The claimant has given the details of the Sabbath day as every sunset of Fridays to sunset of Saturdays. The court finds that the practice of observing Sabbath day as claimed by the claimant has been established on a balance of probability as no evidence was placed before the court to rebut the claimant's assertion.

The **3<sup>rd</sup> issue** for determination is whether the decision by the respondents not to accord and afford the claimant the right to observe his Sabbath day from Friday Sunset to Saturday Sunset and to compel him to attend training on Saturday was unconstitutional, improper and unlawful. The claimant wrote and sought to be exempted from the Saturday training sessions long before the commencement of the training. The respondents opted not to respond. Instead, the respondents decided to subject the claimant to the training in the claimant's expectation that he would be exempted but instead he was punished for harboring and implementing that expectation.

A view which is not broad would be that a person who takes his or her religious duties seriously should

never accept employment in the public service such as service in the 1<sup>st</sup> respondent's employment. Article 27 of the Constitution clearly protects the right to equality and freedom from discrimination including on account of the person's religion, conscience and belief. Section 5(3) of the Employment Act, 2007 provides that no employer shall discriminate directly or indirectly against an employee or prospective employee or harass an employee or prospective employee on grounds including religion.

The court has considered the circumstances of this case and finds that by neglecting or refusing to act by considering and responding to the claimant's request for exemption from training on the Sabbath day and subsequently subjecting the claimant to the training on Sabbath day without addressing the request amounted to harassing the claimant on account of his religion and belief. It is unacceptable for the respondents and any other employer to embrace a policy and impose it on the employee without contractual provision or relevant consultation with the consequence that the employee's religion and belief is undermined culminating in imposition of a punishment. In choosing to work for the 1<sup>st</sup> respondent, the claimant cannot be said to have voluntarily opted to place limitation upon certain of his fundamental freedoms and rights including the right to his religion and beliefs without any express and legitimate or lawful agreement in that regard.

The court has carefully considered the circumstances of the case and finds that even if the respondents did not want to exempt the claimant from the Saturday training, the decision not to release him from training on the Sabbath day should have been given due consideration by taking into account the claimant's rights under Article 32 so that reasonable accommodation would have been made. The claimant testified that in the training time table, Sunday was a free day and he would have made up for lost hours on that free day. In the court's opinion, such were considerations that the respondents ought to have made in arriving at a balanced decision in view of the claimant's request to be exempted. The material before the court showed that the respondents failed to make the relevant considerations and failed to make a response to the claimant's request. The court finds that the respondents failed to respond and take into account justification of the limitation in imposing the Sabbath day training sessions upon the claimant. As provided under Article 24 of the Constitution, the respondents had to establish that they had taken into account the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation; the prejudice to others' rights and fundamental freedoms; and the relation between the limitation and its purpose and whether there were less restrictive means to achieve the purpose. The court finds that the respondents failed to take into account the relevant considerations as envisaged under Article 10 of the Constitution providing for the principles and values of governance that must be taken into account.

Accordingly, the court finds that the decision by the respondents not to accord and afford the claimant the right to observe his Sabbath day from Friday Sunset to Saturday Sunset and to compel him to attend training on Saturday was unconstitutional, improper and unlawful as it contravened the claimant's freedom of religion and belief under Article 32 of the Constitution.

The **4<sup>th</sup> issue** for determination is whether the decision by the 1<sup>st</sup> respondent to mete out a demotion vide letter dated 18<sup>th</sup> July 2013 was improper, unlawful, wrongful and oppressive. RW2 testified that issues of misconduct at the paramilitary school were in the exclusive authority of the commandant. As submitted for the respondents, the court holds that while admitted at the paramilitary school, the claimant continued in employment as the employment had not been suspended or otherwise terminated during the training period. However, as testified by RW1, during training, the claimant was under the commandant's administrative disciplinary powers as any misconduct during the training, in the opinion of the court, related to breach of the school's rules and not the breach of the terms and conditions of employment. Thus, the court holds that it was not open for the 1<sup>st</sup> respondent as an employer to assume authority and purport to adjudicate over alleged breach of the school rules by invoking the employer's administrative disciplinary proceedings. In any event, it was not established before the court that the school rules had been incorporated as part of the terms and conditions of service between the claimant and the respondents. The court further finds that the decision that the claimant undertakes the training at his own expense was unfounded as it was not established that there had been due process attributing the expulsion of the claimant from training to the claimant's misconduct and there was no decision placed before the

court terminating the claimant's training. The material placed before the court only showed that there was unresolved issue on the claimant's request to be exempted from training on Sabbath day but which was never addressed and decision made either by the school commandant or the respondents. The court holds that the respondents cannot, in such circumstances, be allowed to take advantage of their failure to exercise their duty to act in response to the claimant's concerns. As urged for the claimant, the one hour lateness on the date of reporting for training at the paramilitary school had been conclusively handled through the punishment as imposed by commandant. The court has also found that the claimant's breach of the school's rules was in the commandant's exclusive jurisdiction as per the respondent's evidence.

As the court has found that the respondents lacked authority to deal with claimant's breaches of the paramilitary school rules, the court shall not delve into the issue of fairness of the disciplinary proceedings against the claimant because the proceedings were a nullity *ab initio* for want of authority to embark upon a disciplinary proceeding as the 1<sup>st</sup> respondent purported to proceed.

The claimant prayed for general damages. The court has considered the circumstances of the case and finds that it is sufficient that the respondents will facilitate the claimant to attend the paramilitary training at the 1<sup>st</sup> respondent's expense.

In conclusion, judgment is entered for the claimant against the respondents for:

1. The declaration that the decision by the respondents not to accord and afford the claimant the right to observe his Sabbath day from Friday Sunset to Saturday Sunset and to compel him to attend training on Saturday was unconstitutional, improper and unlawful as it contravened the claimant's freedom of religion and belief under Article 32 of the Constitution.
2. The declaration that the decision by the 1<sup>st</sup> respondent to mete out a demotion vide letter dated 18<sup>th</sup> July 2013 was improper, unlawful, wrongful and oppressive.
3. The respondents will facilitate the claimant to attend the paramilitary training at the 1<sup>st</sup> respondent's expense within 12 months from the date of this judgment.
4. The 1<sup>st</sup> respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered in court at Nakuru this Friday, 26<sup>th</sup> September, 2014.**

**BYRAM ONGAYA**

**JUDGE**