



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
PETITION NO 38 OF 2013

PRISCA KEMBOI.....1ST PETITIONER

GRACE NYABOKE OSORO.....2ND PETITIONER

KENNEDY GESORA TAI.....3RD PETITIONER

VS

KENYA POST OFFICE SAVINGS BANK.....RESPONDENT

JUDGMENT

Introduction

1. The Petitioners are all faithfuls of the Seventh Day Adventist (SDA) Church and employees of the Kenya Post Office Savings Bank, the Respondent herein. The Seventh Day Adventists ordinarily observe Saturday as their day of worship. The dispute in this Petition arises from the requirement by the Respondent that the Petitioners work on Saturdays.
2. The matter first came before me on 4th November 2013 by Notice of Motion under certificate of urgency and I granted interim orders restraining the Respondent from taking disciplinary action against the Petitioners on account of the Petitioners' right to observe Saturday as their day of worship. By consent of the parties the interim orders were extended pending determination of the Petition on priority basis.

The Petition

3. The 1st Petitioner, Prisca Kemboi was employed by the Respondent on 6th October 1997. She is an active and practicing member of Newlife SDA Church along 5th Ngong Avenue where she serves as a Deaconess.
4. The 2nd Petitioner, Grace Nyaboke who was employed by the Respondent on 1st November 1990 is an active and practicing member of Nairobi East SDA Church along 5th Ngong Avenue, Nairobi where she serves as a Chaplain attached to Utawala Academy.
5. The 3rd Petitioner, Kennedy Gesora Tai was employed by the Respondent on 2nd April 1992. Tai is an active and practicing member of Ronkai Central SDA Church where he serves as a Church Elder.
6. The Petitioners plead that at the commencement of their employment contracts, their adherence to the SDA faith was made known to the Respondent. Among the fundamental tenets of

the SDA faith is the observance of the hours between sunset on Friday and sunset on Saturday as a day of worship, also known as the Sabbath.

7. Prior to the dispute before the Court, the Petitioners had not been required to work on Saturdays. In order to accommodate the Petitioners, the Respondent had generally allowed arrangements such as working through the lunch break, working extra hours in the evenings and on Sundays to compensate for the half day work hours that the Petitioners did not serve on Saturdays.

8. However in the recent past, the Respondent had begun to compel the Petitioners to work on Saturdays. The Respondent had also instituted disciplinary proceedings against the Petitioners on account of failing to report to work on Saturday.

9. It is the Petitioners' case that the Respondent's actions are in contravention of Article 32 of the Constitution, 2010 which guarantees the freedom of conscience, religion and belief. The Respondent's actions also contravene Article 27 on the right to equality and freedom from discrimination as well as Article 47 on fair administrative action. The Petitioners aver that employees of the Respondent who profess the Islamic faith are allowed leave to be absent from work on Fridays to observe their day of worship.

10. The Petitioners seek the following reliefs:

- a. A declaration that their rights to freedom of conscience, religion, belief and opinion guaranteed under Article 32, right to equality and freedom from discrimination guaranteed under Article 27 and the right to fair administrative action guaranteed under Article 47 of the Constitution have been and are being violated;
- b. An order restraining the Respondent from intimidating, interdicting, dismissing or otherwise harassing the Petitioners on account of their rights to freedom of conscience, religion, belief and opinion guaranteed under Article 32 of the Constitution;
- c. Nullification of all disciplinary actions in force or pending against the Petitioners on account of the legitimate exercise of their rights under Article 32 and reinstatement of any emoluments, benefits and privileges withheld from the Petitioners on account thereof ;
- d. An order directing the Respondent to promulgate a new policy or amend the existing Code of Conduct to be in conformity with the Constitution and in particular with regard to the rights of the Petitioners and other employees guaranteed under Article 32 of the Constitution and prescribing the manner by which the Petitioners and other employees may enjoy their unfettered rights under Article 32 without prejudicing the operations and business interests of the Respondent;
- e. An order that the costs of and occasioned by this Petition be borne by the Respondent.

The Respondent's Reply

11. In a replying affidavit sworn by the Respondent's Company Secretary, Mercy N.K Mbijiwe on 4th December 2013 it is deponed that the Respondent's Terms and Conditions of Service and its Code of Conduct were formulated under its mandate as per Section 15(1) of the Kenya Post Office Savings Bank Act, Cap 493B Laws of Kenya. These documents form the foundation and provide the principles governing the working relationship between the Bank and its employees.

12. As provided in the Terms and Conditions of Service, the hours of duty at the Respondent Bank are determined by the intensity of work to be performed, having regard to the particular circumstances of the department where such work is performed. Clause 2.1 of the Terms and Conditions of Service sets out the working hours as 8.00 am to 5.00 pm with a one hour lunch break between 1.00 pm and 2.00 pm, Monday to Friday and from 8.00 am to 11.30 am on

Saturdays.

13. With regard to the 1st Petitioner, Prisca Kemboi, it is deponed that she accepted the responsibility of a cashier with full knowledge and understanding of the duties of a cashier and especially the requirement to work six days a week including Saturday.

14. On 11th May 2011, the 1st Petitioner wrote to the Respondent seeking exemption from duty on Saturday since it was her day of worship and on 23rd May 2011, she was issued with a show cause letter for being absent from duty on Saturday, 21st May 2011 without permission.

15. Kemboi was issued with a subsequent show cause letter on 4th July 2011 for being absent from duty on 2nd July 2011. She responded to the show cause letter stating that 2nd July 2011 being a Saturday was her day of worship.

15. On 15th January 2013, she was informed that as per the Respondent's Terms and Conditions of Service and the Collective Bargaining Agreement, all staff were required to work on Saturdays. Consequently, she was instructed to report for work on Saturday, 19th January 2013.

16. On 22nd January 2013, the 1st Petitioner was issued with yet another show cause letter for failing to report to work on Saturday, 19th January 2013. On 24th January 2013, she wrote to the Respondent stating that she was an SDA faithful and that from the time she joined the Bank, she had attended Church every Saturday. She asked to be transferred to another department where it was not mandatory to work on Saturday.

17. On 29th January 2013, the 1st Petitioner was issued with a warning letter for her continued absence from duty on Saturdays and on 30th January 2013, without any authority she made a local arrangement with another employee, Grace Tum to step in for her on Saturdays.

18. A final warning letter was issued to the 1st Petitioner on 5th February 2013 and a follow up show cause letter was issued on 14th February 2013. In her response dated 15th February 2013, the 1st Petitioner reiterated that Saturday was her Sabbath and offered to forfeit her salary for the Saturdays she was away.

19. Having failed to report for duty on Saturday 16th March 2013, the 1st Petitioner was interdicted effective 19th March 2013. She was then invited to a disciplinary meeting on 14th May 2013. The Respondent's Disciplinary Committee considered her case and recommended that she be surcharged for the Saturdays she did not attend duty from 15th January 2013 to 11th March 2013 when she was interdicted. It was also recommended that a warning letter be issued to her if she failed to adhere to the Terms and Conditions of her employment.

20. On 3rd September 2013, the 1st Petitioner's interdiction was lifted and she was surcharged Kshs. 19,383.84 being the equivalent of 8 days' salary. She was also warned that failure to observe official working hours would lead to more severe disciplinary action. Her appeal against this decision was declined.

21. On 28th September 2013, the 1st Petitioner absented herself from work without permission and was subsequently asked to show cause why disciplinary action should not be taken against her. In her response, she asked to be allowed to forfeit her lunch hour every day to compensate for the working hours on Saturday. She also offered to forfeit her salary for the day. On 10th October 2013, she was issued with a warning letter for absenting herself from work without permission.

22. On 25th October 2013, the 1st Petitioner applied for one day leave to be taken on 26th October 2013 but her application was rejected. She nevertheless did not report for duty on 26th October 2013 and was consequently issued with a show cause letter on 28th October 2013. In her response dated 30th October 2013, the 1st Petitioner asked the Respondent to come up with a policy to accommodate her spiritual needs.

23. Mbijiwe depones that the Respondent wrote to the 2nd Petitioner, Grace Nyaboke Osoro on 7th February 2013 notifying her that the first and last Saturdays of the month were compulsory working days for employees of the Respondent Bank.
24. On 27th March 2013, Osoro wrote to the Respondent requesting to be allowed time off on Saturdays. She further stated that she had, since joining the Bank, been compensating for the Saturdays by working over lunch hour. She asked that this arrangement be formalised.
25. On 27th May 2013, the 2nd Petitioner was issued with a show cause letter after she continued absconding duty without permission and she responded to the show cause letter on 28th May 2013. On 10th June 2013, she was issued with a warning letter on this account. On 24th June 2013, the 2nd Petitioner asked to be given Saturday off duty to enable her observe her day of worship and on 25th June 2013, she requested to be transferred to another department.
26. On 5th August 2013, the 2nd Petitioner was issued with another show cause letter for absenting herself from work without permission despite being warned on 10th June 2013. She was subsequently issued with another warning letter on 6th August 2013. Subsequent warning letters were issued on 27th August, 10th October and 16th October 2013.
27. On 25th October 2013, the 2nd Petitioner applied for one day leave to be taken on Saturday, 26th October 2013 but her application was rejected. In spite of her leave application being rejected, the 2nd Petitioner did not report for work on 26th October 2013 prompting the Respondent to issue her with a warning letter on 28th October 2013. In her response dated 30th October 2013, the 2nd Petitioner stated that her case was a policy issue and not a disciplinary matter.
28. With regard to the 3rd Petitioner, Kennedy Gesora Tai, it is deponed that on 25th April 1992, while serving as a clerical officer he requested to be exempted from working on Saturdays. The exemption was granted on condition that he put in extra time of half an hour every day in order to meet work targets set for Saturday. The exemption was however not perpetual but an understanding between the 3rd Petitioner and his then supervisor.
29. Mbijiwe goes on to depone that when the exemption was granted, the circumstances allowed the 3rd Petitioner's absence on Saturdays since he was an Officer II and the Respondent had a large number of employees. Tai had since been promoted to perform more sensitive functions and the number of employees had greatly reduced following a restructuring and Voluntary Early Retirement Scheme.
30. On 15th January 2013, the 3rd Petitioner was notified that as per the Respondent's Terms and Conditions of Service and the Collective Bargaining Agreement, all staff were required to work on Saturdays. He was therefore asked to report to work on Saturday, 19th January 2013. Having failed to report to work as instructed, the 3rd Petitioner was issued with a show cause letter on 22nd January 2013. He responded on 24th January 2013 and on 29th January 2013, he was issued with a warning letter for his continued absence from work on Saturdays.
31. On 5th February 2013, the 3rd Petitioner was issued with a final warning letter and on 8th February 2013 he appealed stating that he had always been willing to put in extra hours to compensate for Saturday and that he had made arrangements with a colleague in case of any issues arising in his absence.
32. On 11th February 2013, the 3rd Petitioner wrote to the Respondent seeking a transfer to another department and also exemption from work on Saturdays. On 14th February 2013, he was issued with another letter on the issue of his continuous absence from duty on Saturdays to which he replied on the same day. He also applied for one day leave to be taken on Saturday, 16th February 2013 but his application was declined.

33. On 13th March 2013, the 3rd Petitioner was instructed to report on duty on Saturday 16th March 2013 and reminded that he had been issued with a final warning on 4th February 2013. Upon failure to comply, the 3rd Petitioner was interdicted effective 19th March 2013. He was invited to appear before the Staff Disciplinary Committee on 14th May 2013.

34. The Disciplinary Committee considered the 3rd Respondent's case and recommended that he be surcharged for the Saturdays he had not worked from 15th January 2013 to 11th March 2013 when he was interdicted. His interdiction was lifted effective 3rd September 2013 and he was surcharged Kshs. 21,696.24, being the equivalent of 8 days' salary. He was also issued with a warning letter. On 9th September 2013, the 3rd Petitioner appealed against the conditions on which his interdiction had been lifted but the appeal was declined.

35. On 27th September 2013, the 3rd Petitioner renewed his request for exemption from work on Saturdays offering to compensate the time with extra hours during the week or recovery of leave or salary. He did not report for duty on 28th September 2013 and was therefore issued with a show cause letter on 2nd October 2013 to which he responded by letter dated 3rd October 2013. He was then issued with a warning letter dated 10th October 2013.

36. On 25th October 2013, the 3rd Respondent applied for one day leave to be taken on Saturday, 26th October 2013 which application was declined. He did not report for work on 26th October 2013 and was therefore issued with a show cause letter on 28th October 2013 to which he responded on 30th October 2013 reiterating that Saturday was his day of worship.

Findings and Determination

37. The issue for determination in this Petition has to do with the Petitioners' rights to freedom of conscience, religion, belief and opinion guaranteed under Article 32 of the Constitution, 2010 vis a vis the Respondent's right under the contracts of employment with the Petitioners. Under this broad head, the following issues have emerged:

- a) Whether this Petition amounts to a class action;
- b) Whether in requiring the Petitioners to work on Saturdays, the Respondent has violated the Petitioners' rights under Article 32 of the Constitution;
- c) The extent to which the Petitioners' rights under Articles 32 may be limited;
- d) Whether the Respondents' past conduct amounts to a waiver of its Terms and Conditions of Service and Code of Conduct and operates as an estoppel against the Respondent;
- e) Whether the right to fair administrative action under Article 47 of the constitution applies in employment relationships in the public sector.

Nature of the Petition

38. The Respondent submits that if the reliefs sought by the Petitioners are granted, the Court will have opened a Pandora's box where employees of diverse religious persuasions will insist on taking time off to observe their various days of worship. According to the Respondent that would lead to industrial unrest and hurt institutions and businesses.

39. The Petitioners however maintain that their Petition seeks to enforce their specific rights within the context of their employment relationship with the Respondent. They do not seek to pursue a class action whose prayers would affect other employees of the Respondent or any other institution.

40. As stated by the Court of Appeal in *East African Cables Limited Vs Public Procurement*

Complaints Review and Appeals Board [2007] eKLR courts are expected to consider the effect of their decisions. In my view, this becomes more crucial in interpreting and enforcing rights under the Constitution. This Court is therefore fully aware and has warned itself of the inherent minefield in adjudicating the dispute in this Petition.

41. My understanding of the fear expressed by the Respondent is that if the Court rules in favour of the Petitioners, then other employees will follow suit; pilots will refuse to take to the skies, doctors will switch off dialysis machines and chefs will refuse to cook on their respective days of worship. That would definitely result in industrial chaos.

42. However, the Court is called upon to consider every dispute that comes before it without succumbing to judicial cowardice. In this spirit, I have carefully considered the issues raised in this Petition and have formed the opinion that the Petitioners are seeking enforcement of their individual rights under the Constitution and their respective employment contracts. I therefore find that these claims lend themselves to adjudication on their own merit.

The Petitioners' Rights under Article 32 of the Constitution, 2010

43. The Petitioners' plea is based on Article 32 of the Constitution which provides as follows:

including-

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of limitation;

(c) the nature and extent of limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom-

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

49. In *Seventh Day Adventists Church (East Africa) Limited Vs Minister for Education & 8 Others [2014] eKLR Lenaola J* added that in adjudicating conflicting rights, the Court “**must assess the harm that would result from limiting the particular right or freedom in relation to the harm that might be caused to individuals or the community if the Petitioner's freedom or right were to be allowed to take its course.**”

50. The Petitioners concede that their rights under Article 32 are subject to limitation. They however state that the limitation being pursued by the Respondent does not meet the threshold set under Article 24 above cited. First, the proposed limitation proceeds from an internal policy of the Respondent and not from any law. Second, the proposed limitation is neither reasonable nor justifiable.

51. The Petitioners state that Saturday is their Sabbath. The Sabbath is a Judeo Christian concept with its origin in the creation as recorded in the Bible at Genesis 2:2 where God created everything in six days after which He rested on the seventh day. This initiated a set time each week called the Sabbath which means “**to rest or lay aside labour.**” Genesis 2:3 states that God blessed the seventh day and made it holy. Further, the Fourth Commandment as recorded in Exodus 20:8 instructs Christian believers to “**remember the Sabbath day by keeping it holy.**”

52. Christians differ on the actual seventh day on the calendar as between Saturday and Sunday but the Seventh Day Adventists observe the Sabbath on Saturday. The Court was referred to the SDA Fundamental Belief Number 20 and the SDA Church Manual which provide for observance of the Sabbath from sunset on Friday to sunset on Saturday. According to these tenets, SDA faithful are instructed not to work during the Sabbath.

53. The Petitioners also made reference to the *Weekly Rest (Commerce and Offices) Convention, 1957 (No C 106)* at Article 6 which provides for a weekly day of rest and the protection of the traditions and customs of religious minorities.

54. On its part, the Respondent states that Saturday is an official working day for all its employees and the Petitioners' Petition seeks to introduce preferential treatment to a group of employees at the expense of others. The Respondent adds that it has other SDA faithful within its establishment who have not sought exemption from working on Saturday. The Respondent therefore submits that the Petitioners' right under Article 32 of the Constitution does not override its right to regulate the hours of work.

55. A reading of the chronology of events leading to this dispute as narrated by Mercy N.K Mbiyiwe in her affidavit sworn on 4th December 2013 demonstrates the Respondent's resolve to equalise its employees as far as working on Saturday is concerned. In doing so, the Respondent relies on its policy on hours of work.

56. I do not think it is as simple as that. To my mind, when the rights and fundamental freedoms of the individual are under consideration, citing a one fit all policy will not do. On this score, I agree with the holding of **Majanja J in *Kituo Cha Sheria & 8 Others Vs Attorney General [2013] eKLR*** that a policy that does not make provision for examination of individual circumstances and anticipated exceptions is unreasonable.

57. The Respondent states that to allow the Petitioners to observe their day of worship will cause disharmony at the work place because there are employees of other faiths and even some SDA members who have continued to work on Saturdays. In this regard, reference was made to Article 8 of the Constitution which states that ***"there shall be no State religion"*** to demonstrate that what the Petitioners are seeking is to have their religion elevated over other religions.

58. In my view, this is a simplistic way of addressing a matter that is complex and sensitive. Matters of conscience and religion are uniquely personal and for an employer to simply insist that its employees must report to work on Saturday and therefore ignore their day of worship is to miss the point. Considering the efforts made by the Petitioners to secure their day of worship, including offering to put in extra hours during the week, taking leave and forfeiting salary shows the seriousness which the Petitioners attach to their day of worship.

59. Writing in his website, the well known business magnate, Richard Branson of the Virgin Group which employs 5,000 people in more than 50 countries urges employers to exercise flexibility in handling staff time off adding that one should focus on what gets done rather than how many hours employees put in. I am persuaded by this point of view and add that in light of advancement in technology, employers can indeed exercise flexibility in working hours in order to accommodate deserving exemptions to human resource policies.

60. On their part, managers of institutions must move from their corner offices to the shop floor and address the unique needs of employees for maximum returns. An employee who is consistently denied the opportunity to observe their day of worship will not, in my view, be productive. Overall, this Court takes the view that a human resource policy that does not accommodate the unique spiritual needs of employees is unreasonable and it matters not that only a section of employees raise the issue. That said, employees themselves must also exercise flexibility and be ready to ***attend to a sheep or ox that falls into a ditch on the Sabbath*** (see Mathew 12:11 and Luke 14:5).

61. In the instant Petition, the Court finds that the effect of the Respondent's policy on hours of work is not to just limit the Petitioners rights under Article 32 but obliterate them altogether. In my view, this flies right in the face of Article 24 (2)(c) of the Constitution which prohibits limitations that derogate from the core and essential content of rights and freedoms.

Waiver and Estoppel

62. The Petitioners plead that by its past conduct whereby the Petitioners were allowed time off on Saturdays to observe their day of worship, the Respondent waived its policy and was therefore

esstopped from demanding compliance by the Petitioners. While the 1st and 2nd Petitioners were allowed time off through undocumented arrangements with their supervisors and colleagues, the 3rd Petitioner was issued with a letter dated 28th April 1992 granting him permission to be absent from duty on Saturdays on condition that he put in an extra half hour every day to meet set targets.

63. In the case of *Sita Steel Rolling Mills Ltd Vs Jubilee Insurance Company Ltd [2007] eKLR* the Court stated thus:

“A waiver may arise where a person has pursued such a course of conduct as to evidence an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right.”

64. Defining the doctrine of estoppel, the Court in *Serah Njeri Mwobi Vs John Kimani Njoroge [2013] eKLR* held as follows:

“The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person”

65. The Petitioners submit that there exists an established waiver by the Respondent of its right to enforce the Terms and Conditions of Service and Code of Conduct as far as working on Saturdays is concerned. The Respondent responds that any exemptions granted to the Petitioners arose from local arrangements within their respective departments and did not constitute the official position of the Respondent.

66. This argument begs the question as to the mandate and authority of the Respondent's supervisors and departmental heads to organise work in the departments they head. The letter to the 3rd Petitioner is signed by the Manager/Special Duties and the Petitioners consistently for periods ranging from 16 up to 20 years took time off on Saturdays with the full knowledge and acquiescence of their departmental heads.

67. In the case of *Michael Mwalo Vs Board of Trustees National Social Security Fund (Cause No 1093 of 2012)* this Court held that an employee dealing with a senior official of an organisation is not expected to go into the corporate boardroom to confirm whether the official in fact has authority to do what he seeks to do.

68. The Petitioners were allowed time off on Saturdays by their supervisors and the Respondent cannot be heard to say that it had no knowledge of this arrangement. At any rate and as submitted by the Petitioners, there was no evidence that the supervisors and managers involved were found to have done the wrong thing.

69. It is my view therefore that the Respondent created a legitimate expectation in the Petitioners that they would be granted time off on Saturdays to observe their day of worship. I venture to add that the arrangements thus created became part of the Terms and Conditions of Service of the Petitioners which cannot be varied by a general instruction from the Human Resource Department.

Application of Article 47 of the Constitution, 2010

70. In advancing their case, the Petitioners submit that managerial decisions are administrative actions within the province of Article 47 and cite the decision of **Ongaya J** in *Shankar Saklani Vs DHL Global Forwarding (K) Limited [2012] eKLR*.

71. I hold a different view to the effect that action taken by an employer against an employee in the Public Sector does not fall within the definition of administrative action under Article 47. This does not however diminish the rights of the employee under the Constitution and applicable labour

laws and in the current case, the findings of the Court are not affected by the interpretation accorded to Article 47 (see *Rebecca Ann Maina & 2 Others Vs Jomo Kenyatta University of Agriculture and Technology [2014] eKLR*).

Conclusion

72. In view of the foregoing findings, the Court has reached the conclusion that the Respondent's actions are in violation of the Petitioners' right to observe their day of worship and makes the following orders:

- a) The Respondent shall review its policy on hours of work in order to accommodate the Petitioners' right to observe their day of worship on Saturday within acceptable limitations;
- b) In the intervening period, the Respondent by its managers, supervisors, employees and/or agents is restrained from taking any disciplinary action against the Petitioners on account of their observing Saturday as a day of worship;
- c) The Respondent shall meet the costs of this Petition.

73. I am grateful to learned Counsels appearing in this Petition who made extensive submissions that were helpful to the Court.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 7TH DAY OF OCTOBER 2014

LINNET NDOLO

JUDGE

Appearance:

Mr. Onyambu the Petitioners

Miss Oyombe for the Respondent