



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO.33 OF 2016

IN THE MATTER OF THE CONSTITUTION OF ARTICLES 73 & 75(I) (C) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE PUBLIC OFFICER ETHICS ACT, 2003

AND

IN THE MATTER OF THE LEADERSHIP AND INTEGRITY ACT, CHAPTER 395 LAWS OF KENYA

BETWEEN

JARED ADIMO ODHIAMBO.....1ST PETITIONER

GRACE NASONGO.....2ND PETITIONER

AND

KENYA AIRPORTS AUTHORITY.....1ST RESPONDENT

YATICH KANGURO.....2ND RESPONDENT

JUDGMENT

Analysis and Determination

1. I have considered the petition and affidavits in support, the Respondents Replying affidavits, the petitioners oral evidence and submissions and from the aforesaid the following issues arises or determination.

- a) Whether the Board of Directors of the 1st Respondent acted wrongfully and unlawfully when it failed, neglected and/or refused to act on the complaint served on 16h December 2015 by the petitioners against the 2nd Respondent?
- b) Whether the Board of the 1st Respondent has contravened the provision of section 35 of the Public Officer Ethics Act 2003 and section 47 of the Leadership and Integrity Act 2012)?
- c) Whether the court can declare the arrest and arrangement of the petitioner to court unlawful and unconstitutional?
- d) Whether court can issue a declaration that Yatech Kangugo is unfit and/or unsuitable to hold any public office in the Government of Kenya and whether the 2nd Respondent can be removed and/or sacked by 1st Respondent from its employment with immediate effect?
- A) Whether the Board of Directors of the 1st Respondent acted wrongfully and unlawfully when it failed, neglected and/or refused to act on the complaint served on 16h December 2015 by the petitioners against the 2nd Respondent?

2. The 1st Respondent is a body corporate established under the provisions of section 3 of the Kenya Airport Authority Chapter 395 Laws of Kenya. The 2nd Respondent is acting Managing Director of the 1st Respondent.

3. The petitioner aver that on diverse dates between 8th and 14th March 2014 the 2nd Respondent without following the due process caused the arbitrary arrest and arrangement of the petitioner in the Chief magistrate court at Milimani Criminal Case No. 213 of 204 and again in Criminal Case No.214 of 2014. The petitioners filed Judicial Review application in the High Court at Mombasa in Misc App. No. 12 of 2014 (JR) challenging that arrest and arrangement in court. The application was heard and court granted orders of certiorari and prohibition. The court found that the petitioners right to a fair hearing as guarantee by the constitution were breached by the 2nd Respondent.

4. The petitioners aver that as consequence of the aforesaid court's ruling in favour, that on 16th December 2015 they lodged a complaint against the 2nd Respondent urging the 1st Respondent to institute an impartial and independent investigations on the alleged violation and abuse of office by the 2nd Respondent giving the 1st Respondent 30 days to respond. It is the petitioners contention that the 1st Respondent has powers under section 29(1) of the Kenya Airport Authority Act to appoint and exercise disciplinary control over its employees.

5. The petitioners urge that the 1st Respondent was under sections 42(2) (3)(4)(5) and (6) of the Leadership and Integrity Act, 2012 required to carry out the investigation and arrive at a verdict. It further urged the 2nd Respondent is a state officer and qualified for investigation under the provision of section 42(1) of the Leadership and Integrity Act, 2012.

6. The petitioners further contended the 1st Respondent's failure to act on the petitioner complaint violated provisions of Article 10 on the National violated principles and article 4 of the constitution.

7. The 1st Respondent terms the petition as inept, frivolous, and vexatious and an abuse of the court process. It is averred the petition dwells in the circumstances surrounding the contract signed between 1st Respondent and petitioner's employer's Mason Services Limited installation, operation and management of our party and revenue management system, at Moi International Airport, Mombasa. It is asserted by the 1st Respondent while it had out said the services of the petitioner's employer, it had overall responsibility of supervising and ensuring compliance on part of the management company and the operation were to be supervised by Airport Manager. The 1st Respondent as such had core mandate to ensure provision of quality services to members of public using facilities within its premises and that petitioners were under duty to provide quality services to members of the public while actin professionally and with decision.

8. The 2nd Respondent contends that he received numerous complaints against the petitioners to the effect that they were harassing members of the public at the toll booths and wrote to the petitioners employer Mason Services Limited through a letter dated 10th March 2014 (YK-3) requesting for petitioner's redeployment, the letter was delivered but the company destroyed it.

9. In the instant petition **PW1** Jared Adimo Adhiambo gave evidence and stated that M/s Mason Services Ltd was given contract by 1st Respondent to collect taxes from motor vehicles entering Moi International Airport Mombasa. **PW1** was the team leader at the toll operation. He stated that on 8/3/2014 while he was away Hon. Balala's car exiled without paying. **PW1** proceeded to adopt the contents of his affidavit sworn on 20/2/2016. The petitioner in cross-examination admitted that on 10/3/2014 he was pushed by Torich in appropriately while at the toll station and later the 2nd Respondent order police to assist him to come and arrest him He admitted the 2nd Respondent is not a member of police. He further admitted the 2nd Respondent not a party in JR Case.

10. The petitioners have in the petition not demonstrated that the reporting of the incident to police by the 2nd Respondent as described by **PW1** in his evidence was a gross misconduct and that his complaint to the 1st Respondent fell within the matters amounting to gross misconduct for which the 1st Respondent is obligated to intervene. The 1st Respondent contend that it would only intervene in matters amounting to gross misconduct and done for personal interest. It has not been demonstrated the petitioner's complaint fall within that category for the 1st Respondent to interfere. It is further contended that 2nd Respondent acted in consultation with 1st Respondent regarding constraints raised against the petitioners with a view to maintain order at the toll booth manned by the petitioners at the Airport. The 2nd Respondent had statutory mandate under the Kenya Airport Authority Act to issue orders to the employees and agents working within the premises of the 1st Respondent to maintain peace and order. I further find that it has not been demonstrated that the 2nd Respondent arrested the petitioners and that the decision to arrest was safely made by police in accordance within the law. It is of great concern to notice the national police is not made a party in this matter.

11. From the aforesaid I find that it has not been demonstrated that the 1st Respondent acted contrary to its mandate and/or the constitution or any statute. The 2nd Respondent had consulted with the 1st Respondent and as per the 1st Respondent the 2nd Respondent acted lawfully and in course of his duties and employment and there was nothing else to investigate on.

B) Whether the Board of the 1st Respondent has contravened the provision of section 35 of the Public Officer Ethics Act 2003 and section 47 of the Leadership and Integrity Act 2012)?

12. The petitioners contend that the 2nd Respondent contravened the provisions of section 35 of Public Officer Ethics Act 2003 and section 42 of the Leadership and Integrity Act, 2012. The petition has under paragraph of his petition averred the said sections were violated but has not given any particulars in support of the aforesaid allegations similarly in his oral evidence and the affidavit no particulars have been given. The Respondents have in response termed the petitioner petition as frivolous. The 2nd Respondent has averred that he discharged his duties as a police officer in accordance with the provisions of the Kenya Airport Authority Act; section 9(1) 9(c) of the Public Officers Ethics Act and section 10(a) of the Leadership and Integrity Act, 2011. The petitioners have not demonstrated to the contrary that the Respondents violated the public officers Ethics Act and/or Leadership and Integrity Act, 2011. It has similarly not been shown that the 2nd Respondent is liable for duties discharged in good faith. Further petitioners have failed to demonstrate any gross misconduct on part of the 2nd Respondent.

13. From the aforesaid I am satisfied that the petitioners have not shown that the 1st Respondent contravened the provisions of section 35 of the Public Officer Ethics Act 2003 and section 42 of the Leadership and Integrity Act 2012.

C) Whether the court can declare the arrest and arrangement of the petitioner to court unlawful and unconstitutional?

14. The petitioners contention is that the 2nd Respondent in directing the arrest and subsequent arrangement in court of the petitioner acted in total disregard of the petitioner's right and further lacked report of the petitioner as employee of the an independent entry. The petitioner in his evidence before court through cross-examination is that one Yatich posted him in appropriately while in the toll station and later the 2nd respondent ordered police to come and arrest the petitioner. The petitioner in the instant matter was arrested by police and charged by the police not the 2nd respondent. The 2nd Respondent, it has not been demonstrated had power and authority to command police to arrest and charge the petitioner. In his petition the National police and **DPP** who are charged of arrest and prosecution are not parties. It has further not been demonstrated that the acted out of their mandate and that the arrest and prosecution was unlawful and constitutional. I find no basis to find the arrest and arrangement before the court was unlawful and constitutional.

15. Whether court can issue a declaration that Yatich Kangugo is unfit and/or unsuitable to hold any public office in the Government of Kenya and whether the 2nd Respondent can be removed and/or sacked by 1st Respondent from its employment with immediate effect?

D) Whether court can issue a declaration that Yatich Kangugo is unfit and/or unsuitable to hold any public office in the Government of Kenya and whether the 2nd Respondent can be removed and/or sacked by 1st Respondent from its employment with immediate effect?

16. The petitioners are contending that the 2nd Respondent has already been found by the High Court in its Ruling in JR No. 12 of 2014. He has committed violations of the constitution thus:-

i) Petitioners' right to a fair trial contrary to the provisions of Article 50(2)(a) & (b);

ii) Petitioners' right to fir administrative action contrary to the provisions of Articles 10 and 47;

iii) The 2nd Respondent was found to have acted maliciously and oppressively towards the petitioners contrary to implication to the provisions of Article 28.

17. It is contended that the 2nd Respondent as a public officer is bound by the National values and principles of governance in Article 10 of the Constitution of Kenya. That in pursuant of section 10 of the Public Officer Ethics Act, 2003, the 2nd Respondent is resulted to carry out his duties according to the law and s the provisions of the public officer Ethics Act 2003 forms part of the leadership and Integrity Act 2013 pursuant to section 613 of the Act, it is petitioners submission the 2nd Respondent subject to provisions of chapter is of the constitution. The 2nd Respondent is not suitable to continue holding a public office.

18. In the JR No. 12 of 2014 (JR) the 2nd Respondent was a participant but the officer found thereon was that of General Manager, Moi International Airport. The 2nd Respondent has not sued as an individual. The court's finding the petitioner seek to rely on are clear. The court in its ruling detected the petitioners violated rights. Thewe against a manager of an institution and not against the 2nd Respondent as a person.

19. **Article 236(a) and (b)** provides:-

"A public officer shall not be—

(a) Victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or

(b) Dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law."

In the instant petition the 1st Respondent and 2nd Respondent have demonstrated that the 2nd Respondent at the material time he was performing the functions of his office in accordance his statutory mandate and constitution and cannot as sought by the petitioners be removed from office or dismissed without being subjected to discretionary action and without due process of the law. It therefore turns out that it is not for this court in this petition to order removal of the 2nd Respondent from office without due process by followed. Secondly the issue of employee and employment is not within this court's jurisdiction but ELRC court.

20. To the extent of my findings, I find no merit in this petition and the same is dismissed.

Each party to bear its own costs.

Dated, signed and delivered at Nairobi this 29th day of April, 2020.

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J .A. MAKAU

JUDGE