



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL PETITION NO. 22 OF 2011

ABOUD SALIM SULEIMAN PETITIONER

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED RESPONDENT

JUDGMENT

BACKGROUND

1. The petitioner has been working with the respondent company for over 24 years as a public health officer with the Ukunda Emergency Team, when on 15th May 2008 he was arrested on alleged involvement in corruption and charged in Anti-Corruption Case No. 3 of 2008. He subsequently received a letter on 19th May 2008 inviting him to show cause why disciplinary action should not be taken against him for the alleged involvement in corruption and absenteeism. Despite his explanation, the respondent dismissed him. The petitioner was subsequently acquitted of all the charges in the corruption case on 6th March 2009. The petitioner decries that despite acquittal, the respondent has neither reinstated him nor paid him salary arrears, despite demand therefor made.

2. The petitioner had been charged with the offence of soliciting for a benefit contrary to section 39(3) (a) as read with section 48 (1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. It was alleged that on 8th May 2008, at the precincts of Kilimani Villa, Likoni along Shelly Beach Road, in Kilindini District within Coast Province, being a person employed by a public body, to wit the respondent, the petitioner corruptly solicited from Christopher Charles Bird, a benefit of Kshs.30,000/- as an inducement so as to reconnect electricity supply which had been cut off as a result of falling tree branches trimmed by an employee of the said Mr. Bird, Kshs.16,000/- as a reward for having reconnected the electricity and received Kshs.10,000/- as a reward for having reconnected electricity supply. The case was dismissed on 6th April 2009 under section 202 of the Criminal Procedure Code for the reason that the complainant refused to attend court despite being served with summons.

THE PETITION

3. This petition was filed on 25th March 2011 and seeks *inter alia*,

- a. ***A declaration that the respondent's action of withholding the petitioner's salary of which he was entitled at half pay during the subsisting of the criminal case was unfair administrative action which contravenes the provisions of section 62 of the Anti-Corruption and Economic Crimes Act and further contravenes the fundamental rights as enshrined in the constitution.***
- b. ***A declaration that the respondent's action of dismissing the petitioner on the grounds of absenteeism and involvement in fraudulent activity was unfair because the respondent was well***

aware that the reason for absenteeism was due to the alleged charges before the Anti-Corruption Court at Mombasa in Case No. 3 of 2008. The respondent dismissed the petitioner even after the petitioner was acquitted in court. The law provides that once a public officer is acquitted in an anti-corruption case then that officer is entitled to full reinstatement to his previous position. The respondent's failure to reinstate him was therefore unconstitutional.

- c. *An order that the respondent pays to the petitioner the salaries owed to him together with the allowances and reinstate the petitioner to his previous position or in the alternative the respondent pays to the petitioner all the salaries owed to the petitioner together with allowances up to the date when the petitioner was expected to retire.*

4. The petition is opposed. Faith Kaberege, Senior Human Resource and Administration Officer at the respondent's Coast Office, swore an affidavit on its behalf on 28th June 2011. The respondent clarified that the petitioner had been employed as a general worker on 19th October 1984 and had risen over the years to the position of Artisan 1 on 1st September 2006. He had therefore been a team leader for 4 years. On 16th May 2008, the petitioner absented himself without permission and it was after investigations were carried out that his arrest on 15th May 2008 emerged. The petitioner was dismissed by letter dated 21st May 2008 which was to take effect from 23rd May 2008. The dismissal letter indicated that the dismissal was in accordance with section 25 of the Collective Bargaining Agreement and set out the petitioner's entitlements. The petitioner was paid a sum of Kshs.63,240/- via cheque no. 667056. It was claimed that the petitioner's employment was governed by the Employment Act and not by the Anti-Corruption and Economic Crimes Act. The respondent added that it was not the complainant in the Anti-Corruption Case and had no control whatsoever in the arraignment and charging of the petitioner. The respondent stated also that it had given the petitioner an opportunity to be heard prior to his dismissal, and since he was dismissed on account of gross misconduct, could not claim any benefits other than those set out in the dismissal letter, which have been paid to him. It was further alleged that none of the petitioner's constitutional rights had been violated. The collective bargaining agreement was said to be expressly provided for under Article 41 (5) of the Constitution and was therefore not inconsistent with the constitution.

SUBMISSIONS

5. The parties on 14th March 2013 agreed to file and exchange written submissions, noting that there was pending before the court a case similar on all fours to this petition. The petitioner submitted that the issues before the court went beyond the employment relationship and into the arena of fundamental rights. The court was referred to Articles 22, 23, 50 and 159 (2) (a) and (d) of the Constitution. It was submitted that the petitioner's dismissal from employment before he had been proved guilty of the crime he was charged with was illegal and unconstitutional as it was contrary to the presumption of innocence under Article 50 (2) of the Constitution. The case of ***Zacchaeus Kyai Munyao vs Kenya Airports Authority***, Misc. Civil Application No. 569 of 2006, was cited where the court held that a decision arrived at without observing the principles of natural justice is null and void.

6. It was submitted for the Petitioner that under section 62 of the Anti-corruption and Economic crimes Act, the petitioner was entitled to half salary and allowances during the period of his suspension, which the respondent failed to deliver in breach of statutory provisions of article 41 of the Constitution and section 62 of the Anti-Corruption and Economic Crimes Act, 2003. The petitioner argued that section 62 was worded in mandatory terms, and as such had to be complied with whenever a public officer is charged under the Act.

7. It was further submitted that the petitioner was entitled to be reinstated upon his acquittal and as such his rights under articles 26 and 47 of the constitution were being infringed. The Petitioner relied on ***Kadamas vs Municipality of Kisumu***, Court of Appeal at Kisumu, Civil Appeal No. 109 of 1984 where the Court of Appeal held that the acts of any body of persons having legal authority to determine the questions affecting the rights of subjects and having the duty to act judicially are subject to judicial review whenever they are in excess of their legal authority. It was also held in that case that an application cannot fail simply because there may be other remedies available to the applicant.

8. The respondent submitted that the explanation offered by the petitioner for his absence was insufficient. The dismissal was said to have been on the grounds of gross misconduct pursuant to clause 25 of the collective bargaining agreement hinged on the provisions of the Employment Act. It was submitted that the Anti-Corruption and Economic Crimes Act was inapplicable in this case by virtue of clause 27 of the collective bargaining agreement.

9. Further, the Respondent contended that natural justice principles had been observed since the petitioner was given opportunity to show cause why he should not be dismissed but his explanation was not sufficient. The case of *Harrison Githinji vs Karirima Estate* (2005) eKLR was cited. The respondent further submitted that the petitioner had on previous occasions been tasked to show cause for misconduct and indiscipline, and his dismissal was therefore regular. It was denied that the dismissal was based on the Anti-Corruption and Economic Crimes Act.

10. The Respondent, therefore, urged the court to find that where statute provides a complete and express provision, it is not necessary to import provisions of other statutes. The respondent cited the case of *Commissioner for Lands vs. Kunste Hotels Ltd* (1995 – 1998) 1 EA 1 where it was held that where there is an alternative remedy provided by statute which remedy is effective and applicable to the dispute before the court, the court ought to ensure that the dispute is resolved in accordance with the relevant statute. The respondents finally submitted that under Article 41 (5) of the Constitution, the right to engage in collective bargaining was provided for, and therefore the agreement under which the petitioner was dismissed could not now be said to be inconsistent.

ISSUE FOR DETERMINATION

11. Before considering the merit of the petition, an issue arises for determination whether the High Court has jurisdiction over the dispute in the petition in view of Articles 162 and 165 of the Constitution or it is a matter for determination by the Industrial Court.

DETERMINATION

12. Article 165 (5) (b) of the Constitution of Kenya 2010 expressly limits the jurisdiction of the High Court with regard to cases reserved for the jurisdiction of Industrial Court as one of the Courts contemplated under Article 162 (2) of the Constitution. This court's jurisdiction is ousted in express terms as follows:

“165 (5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court

under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”

13. Article 165 (5) of the Constitution is clear on the jurisdiction of the High Court that it does not extend to matters within the competence of court with status of the High Court established under Article 162 (2) of the Constitution. The Employment and Labor Relations Court established under Article 162 (2) of the Constitution has jurisdiction to deal with employment cases. The issue of breach of the petitioner's constitutional right is best raised in the Industrial Court, which apart from being a specialized court for employment and labour matters, is capable of interpreting the Constitution as far as labour rights are concerned.

14. Indeed, the Act of Parliament creating the Industrial Court (renamed Employment and Labour Relations Court by Act. No. 18 of 2014) grants the Court exclusive jurisdiction power to deal with employment and labour matters in these terms:

“12. The Court shall have exclusive original and appellate jurisdiction to hear and

determine all disputes referred to it in accordance with Article 162 (2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations...

There is no suggestion that the Industrial Court in exercising its jurisdiction pursuant to Article 162 (2) (a) of the Constitution is not empowered to consider breaches of constitutional rights and the Rules of Natural Justice which was the subject of the caselaw authorities in ***Zacchaeus Kyai Munyao vs Kenya Airports Authority*** and ***Kadamas vs Municipality of Kisumu***, supra, which were decided before the promulgation of the Constitution of Kenya 2010 which established a specialized court to deal with matters of employment and labour relations to the exclusion of the High Court.

15. In ***Alphonse Mwangemi Munga & 10 Others v. African Safari Club Limited*** [2008] eKLR, Nairobi HC Pet. 564 of 2004 (Nyamu & Wendo, JJ.), the Court lamented the use of constitutional application to litigate private disputes, stating that –

“In the instant case, we wish to emphasize the point that parties should make use of the normal procedures under various laws to pursue their remedies instead of all of them moving to the Constitutional Court and making constitutional issues of what is not. They have as a result lost valuable time to pursue contractual claims and or to have the Industrial Court settle the trade dispute (if any) relating to the matter. The upshot of this petition is that it is an abuse of the court process ad it is hereby dismissed.”

16. In ***Professor Daniel N. Mugendi v. Kenyatta University & 3 Others*** [2011] eKLR, Nairobi HC Constitutional Petition No. 142 of 2011 (M. Ngugi, J.), the court reiterated the objection to making private disputes the subject of constitutional litigation as follows:

“15. Article 165 (3) of the Constitution does, as submitted by the petitioner, grant the High Court jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated or threatened. Such jurisdiction, however, is granted subjected to Article 162 (2) which provides:

‘Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to (a) employment and labour relations....’

The constitution has made provision to safeguard fundamental rights and freedoms, it has also made provision for the adjudication and resolution of disputes arising under different areas of law to the rights of citizens. As submitted by the petitioner’s Counsel, there are various courts set up to deal with various matters, among them the Industrial court to deal with employment matters.

16. The view that his court takes of the matter is that the resolution of such disputes must take place in the forums and through the processes set out under those laws the enactment of which is provided for in the constitution for dealing with the different classes of rights. Only where such forms and processes deal with disputes in a manner that violates the fundamental rights of a party, such as, for instance, by a failure to observe the rules of natural justice or by treating a party in a discriminatory manner, should recourse be had to a constitutional court for protection of the aggrieved party’s fundamental rights.”

17. Similarly, in ***Emmanuel Safari Yaa v Kenya Power & Lighting Co. Ltd*** [2014] eKLR, Mombasa HC Pet. 23 of 2011 (Odero, J.) which the parties herein stated was on all fours with this case, the Court held that-

“I am mindful of the fact that it is settled law that the existence of an alternative process shall not preclude a litigant from approaching the High Court to seek orders. However,

whilst the High Court has unlimited jurisdiction in civil and criminal matters under Article 165 (5) (b) of the Constitution, this jurisdiction does not extend to employment and labour related matters. As such my view is that this is purely a labour matter which ought to properly have been placed before the industrial and labour court for determination. Finally based on the foregoing, I find no merit in the present petition and the same is hereby dismissed with costs to the respondent.”

18. I respectfully agree with the substantive holding of the above decisions that the High Court’s jurisdiction is ousted by the provisions of the Constitution and that the Industrial Court is the proper court to determine issues of employment and labour matters such as the ones the subject of this petition. In my view, the dispute between the petitioner and the respondent is clearly one of private rights of parties under an employment contract, and it should, therefore, be determined by the Industrial Court.

19. In order not to embarrass the Employment and Labour Relations Court (formerly Industrial Court) this court does not make any conclusive findings on the facts of the case. Without prejudging the merits of the petition, however, the applicant’s case appears to be simply that his dismissal was unlawful because it was done before establishment of his guilt in pending corruption charges and because he was not paid his half salary as provided by section 62 of the Anti-Corruption and Economic Crimes Act.

20. There does not appear to be any question of breach of the presumption of innocence, because the applicant was disciplined not because of the criminal charges that he faced but pursuant to the proviso in sub-section 4 of section 62 of the Act which provides in full that

(1) *A public officer who is charged with corruption or economic crime shall be suspended at half pay, with effect from the date of the charge.*

(2) *A suspended public officer who is on half pay shall continue to receive the full amount of any allowances.*

(3) *The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.*

(4) ***This section does not derogate from any power or requirement under any law under which the public officer may be suspended without pay or dismissed.***

The section expressly contemplates and saves, and is without prejudice to, disciplinary process outside the ambit of the section.

ORDERS

21. Having found that this is a matter within the exclusive province of the Employment and Labour Relations Court, I consider that the fate of the petition should lie with the said Court. I respectfully disagree with the course taken by the Court in ***Emmanuel Safari Yaa v. Kenya Power & Lighting Co. Ltd.***, supra, dismissing the petition, and I would rather refer it for consideration by the Industrial Court which has jurisdiction over the employment and labour relations matters.

22. Accordingly, for reasons set out above, I refer the matter to the Employment and Labour Relations Court for consideration and directions. Costs will be in the cause to abide the final outcome of the matter.

DATED SIGNED AND DELIVERED THIS 13TH DAY OF MARCH 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Gikandi for the Plaintiff

Mr. Kiarie Kariuki. for the Defendants

Ms. Linda - Court Assistant.