



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 23 OF 2011

IN THE MATTER OF: ARTICLES 41 & 47 OF THE CONSTITUTION OF KENYA, 2010 AND (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULE 2006

IN THE MATTER OF: ALLEGED CONTRAVENTIONS OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 41 & 47 OF THE CONSTITUTION OF KENYA REGARDIGN PROTECTION OF RIGHT TO LABOUR RELATIONS AND RIGHT TO FAIR ADMINISTRATIVE ACTION AND IN THE MATTER OF THE CONTRACT EMPLOYMENT BETWEEN EMMANUEL SAFARI YAA AND KENYA POWER & LIGHTING COMPANY LIMITED

IN THE MATTER OF: SECTION 62 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003

BETWEEN

EMMANUEL SAFARI YAA.....PETITIONER

AND

KENYA POWER & LIGHTING CO. LTD.....RESPONDENT

JUDGMENT

By way of this Constitutional petition together with a notice of motion dated 24th March, 2011 the petitioner **EMMANUEL SAFARI YAA** prays inter alia for the following orders:

“2. **THAT** the summary dismissal be declared a nullity and instead the petitioner be placed on suspension.

3. **THAT** the petitioner be paid half monthly pay starting from 7th October, 2010 the day the petitioner was charged in Anti-Corruption case No. 13 of 2010.

4. **THAT** in case the petitioner wins and gets acquitted, he should be compensated and be reinstated to his previous position.”

The petition was opposed by the respondents **KENYA POWER & LIGHTING COMPANY** who were the petitioner's employers.

The genesis of this petition is as follows. The petitioner was at the material time an employee of the respondent company and was working as a Telephone Operator in the respondent's Kilifi office. On 7th September, 2010 the petitioner was arrested and charged vide **Anti-Corruption Case No. 13 of 2010** with the offence of **"Corruptly 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 2013."** As a result vide a letter dated 10th September, 2010 the respondent wrote to the petitioner seeking an explanation as to why disciplinary action should not be taken against him. The petitioner replied vide his handwritten letter dated 16th September, 2010. However the respondent proceeded to issue to the petitioner a letter of summary dismissal dated 28th September, 2010. As it timed out the criminal case against the petitioner was discontinued and he was discharged. The petitioner claims that this letter of summary dismissal violated his rights under Articles 41 and 47 of the Constitution of Kenya. Hence this petition filed in court on 25th March, 2011. **MR. GIKANDI** Advocate represented the petitioner whilst **MS. UMARA** acted for the respondent. Written submissions were duly filed and these were highlighted on 17th April, 2013.

Mr. Gikandi for the petitioner submitted that under the provisions of section 62 of the Anti-Corruption and Economic Crimes Act, upon being charged the petitioner was entitled to half pay and allowances during the pendency of his trial. He further submits that following his subsequent acquittal in the criminal trial the petitioner was entitled to be reinstated by the respondent. Finally counsel submitted that it was illegal and unconstitutional for the respondent to dismiss the petitioner before he had been convicted of any crime and that the petitioner was subjected to unfair administrative practice. He urges the court to view this matter not through the narrow lens of an employer/employee dispute but as a wider constitutional issue.

On her part **Ms. Umara** for the respondent submits that this is purely a labour dispute which ought to have been placed before the Industrial and Labour Court for determination. She argues that no clear constitutional issue warranting determination has been raised. In this petition I have identified the following points for determination.

1. **Does the petition raise a constitutional question requiring the intervention of the High Court?**

Article 258(1) of the Constitution of Kenya provides

"Every person has the right to institute court proceedings claiming that this constitution has been contravened, or is threatened with contravention."

However it is not each and every violation of the law that must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through the statutory law then it is desirable that such statutory remedy be pursued first. In his book **"The Law, the procedures and the trends in Jurisprudence on Constitutional and Fundamental Rights Litigation in Kenya"** Elisha Z. Ongoya opines at page 7 as follows

"Not every issue for determination by courts of law is a constitutional issue. In constitutional litigation, there is need to meet a threshold test for a question to be regarded as constitutional. This is intended to avoid raising purely statutory questions before the forum of the constitutional court."

A litigant must state the precise provision of the constitution that he claims has been infringed as well as the precise manner of that infringement. In the case of **ANARITA KARIMI NJERU VS. THE REPUBLIC Misc. Criminal Application No. 4 of 1979** the High Court held that where a person is seeking redress from the High Court on a matter involving a reference to the constitution it is important

(if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision which the provisions is said to have been infringed and the manner in which they are alleged to be infringed. The petitioner herein has alleged an infringement of his rights under Article 41 of the Constitution. Article 41 is in my view too wide a provision to be invoked without precision. Even if this court were to presume that the petitioner meant to refer to a breach of his rights vis-à-vis Article 41(1) i.e. the right to fair labour practices, the petitioner would still have to be precise as to how this Article had been infringed.

The petitioner was issued with a show cause letter to which he responded. As such he was accorded an opportunity to be heard before the decision to dismiss him was made. If the petitioner was aggrieved by the decision to dismiss him then a constitutional petition would not be the correct forum through which to seek remedy. The petitioner has failed to demonstrate any breach of the constitution that would warrant the court to curtail the respondent's right as an employer to exercise the option of summary dismissal. Section 44(4) (a) of the Employment Act 2007 provides for such actions in cases where

“An employee commits or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employers property.”

All in all I am not entirely persuaded that this case is properly before this court for breach of a constitutional right.

2. Nature of the Dispute

The relationship between the petitioner and the respondent was a contractual one of employer-employee. The breach alleged to have occurred took place within the ambit of this relationship. The petitioner has relied on section 62 of the Anti-Corruption and Economic Crimes Act 2003 to support his claim that he ought to have been suspended and placed on half-pay during the pendency of his trial. However, section 62(4) provides

“This section does not derogate from any power or requirement under any law under which the public officer maybe suspended without pay or dismissed.”

A reading of section (4) is that the provision of suspension with half pay does not preclude the adoption of a separate measure provided by any other law (e.g. section 44(4) (a) of the Employment Act.

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.

Dated and delivered in Mombasa this 28th day of May, 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Omondi h/b Ms. Umara for Respondent

Court Clerk Mutisya