



FRANCIS GATHUNGU WAITHAKA.....PETITIONER

VERSUS

KENYATTA UNIVERSITY.....RESPONDENT

## **J U D G M E N T**

### **1. Introduction**

Francis Gathungu Waithaka is the Petitioner herein and in his Petition dated 13<sup>th</sup> October 2008, he has sought the following Orders;

*“(a) It be declared that the Petitioner’s right to a fair hearing, under Section 77(9) of the Constitution was contravened by the Respondent between 8<sup>th</sup> May, 1996 and 3<sup>rd</sup> March 2000.*

*(b) It be declared that the Petitioner’s right under Section 73 of the Constitution – not to be held in servitude – was contravened by the Respondent between 8<sup>th</sup> May 1996 and 3<sup>rd</sup> March 2000.*

*(c) It be declared that the Petitioner’s right under Section 74 of the Constitution – not to be subjected to degrading and inhuman treatment – was contravened by the Respondent between 8<sup>th</sup> May 1996 and 3<sup>rd</sup> March 2000.*

*(d) It be declared that the Petitioner’s right under Section 75 of the Constitution – not to be deprived of his property – has been contravened by the Respondent since 8<sup>th</sup> May, 1996 when he was suspended without pay.*

*(e) It be declared that the Petitioner’s right under Section 82 of the Constitution – not to be subjected to arbitrary and capricious exercise of power – was contravened by the Respondent between 8<sup>th</sup> May, 1996 and 3<sup>rd</sup> March 2000.*

*(f) It be declared that the Petitioner is entitled, in restitution, to Kshs.18,967,737.00/-, the salaries withheld between 8<sup>th</sup> May, 1996 and 3<sup>rd</sup> March 2000, together with compound interest from 8<sup>th</sup> May, 1996 to date of judgment herein.*

*(g) An Order that the Respondent do pay Kshs.18,967,737.00/- to the Petitioner.*

*(h) An Order that the Respondent do pay the Petitioner general damages for contravention of his rights under Section 73, 74, 75, 77 and 82 of the Constitution.*

*(i) An Order that the Respondent do pay the Petitioner exemplary damages.*

*(j) An Order of the costs of this Petition be provided for.”*

### **2. Case for the Petitioner**

It is the Petitioner's case that from 1965 or thereabouts he embarked on a career as a science technician at the University College, Nairobi and when the Respondent University was established, he transferred his services to it and he worked without incident until May 1996 when it was alleged that between January and April 1996, a compressor motor installed in 1982 was stolen and on 8<sup>th</sup> May 1996, he was suspended from employment for reasons that were unknown to him but related to the theft of the motor.

3. Investigations were thereafter commenced and he was invited to appear before the Senior Staff Disciplinary Committee to answer to allegations that he was negligent in his duties and that is what led to the theft of the compressor motor. He made appearances on 6<sup>th</sup> June 1997, 13<sup>th</sup> June 1997, 25<sup>th</sup> July 1997 and 24<sup>th</sup> August 1997 but no proceedings took place. It was only on 3<sup>rd</sup> March 2000 that the proceedings finally took place. He was later found innocent of any wrongdoing including of the charge of gross misconduct whose particulars were not given to him in any event.. He was thereafter reinstated to his job as Chief Technician but the Respondent refused to pay his salary arrears inspite of the assurances contained in the letter of 21<sup>st</sup> June 1996 that upon his innocence being proved, he was so entitled.

4. It is now his case that he was not accorded a fair hearing and that his advocate, one Mr. M'Inoti was stopped from representing him in the proceedings before the Disciplinary Committee aforesaid. Further, that he was held in servitude for the period he was under suspension; that he was subjected to inhuman and degrading treatment; that he was denied the right to disciplinary proceedings being heard and determined within reasonable time; that he was subjected to arbitrary and capricious exercise of public power and that he was not paid his salary and other benefits for the period between 8<sup>th</sup> May 1996 and 3<sup>rd</sup> March 2000. He argues that all these actions were undertaken in contravention of **Sections 73, 74, 75, 77(a), 82** of the **Repealed Constitution** and he was entitled to the reliefs elsewhere set out above.

5. I should clarify at this stage that the Kshs.18,967,737/- that the Petitioner claims that he is entitled to is made up as follows;

***“(i) Kshs.6,619,163.00/-, made up of Kshs.2,990,000/-, his salaries for the period between 8<sup>th</sup> May, 1996 and 3<sup>rd</sup> March, 2000, Kshs.3,629,115.62/-, together with interest at Court rates at 12% per annum; or (sic)***

***(ii) Kshs.4,130,529.24, made up of Kshs.2,990,000/- his salaries for the period between 8<sup>th</sup> may, 1996 and 3<sup>rd</sup> March, 2000, and Kshs.1,140,529.24 on the basis that during that period, the Petitioner's salaries would have been held by commercial banks in fixed deposits at rates decreed/fixed by the Central Bank of Kenya during that period. (sic)”***

## **6. Case for the Respondent**

The Respondent's answer to the Petition is that the same is misguided, incompetent and is an abuse of Court process. While the facts of the dispute are not substantially disputed, it is its case that it is one which falls within the ambit of private Law and has no connection whatsoever with the enforcement of rights under **Section 84(1)** of the **Repealed Constitution**. That what is complained of are actions undertaken within the context of the Petitioner's contract of employment and the proper process to be undertaken is a claim in the Civil Courts as opposed to a claim under the Bill of Rights.

7. Regarding the suspension of the Petitioner during the investigations into alleged misconduct, it is the case for the Respondent that the Petitioner was expressly informed that the proceedings before the Disciplinary Committee were internal and were not in the nature of a hearing before a Tribunal or a Court and therefore representation by Counsel was not an expected right. That therefore all the alleged infringements of the provisions of the Constitution as to rights and freedoms were not proved to the required standard as alleged by the Petitioner.

8. Regarding the claim for Kshs.18,967,373/- it is the Respondent's argument that the same was merely pleaded without proof and a Consultant's report on the same was merely inserted to aid the Petitioner in his quest for unjust enrichment. The attempt at earning interest at Commercial Bank rates is also

dismissed as being baseless and unsupported by both Law and fact. It is sought that for the above reasons, the petition should be dismissed with costs.

## **9. Determination of issues arising**

With the above background, I should begin by addressing an issue that ran through the Submissions by the advocate for the Respondent; i.e. whether the Petition is premised on a complaint in private Law or not and whether any remedy under Section 84 of the Repealed Constitution can be granted.

10. I have elsewhere above reproduced the real dispute between the parties. It is not denied that after the Petitioner was heard by the Senior Staff Disciplinary Committee he was reinstated to his position of employment and even after he reached the retirement age, he was retained on contract for a number of years. It is only the period of suspension i.e. 8<sup>th</sup> May 1996 to 3<sup>rd</sup> March 2000 that is an issue.

11. The Respondent's case in that regard is that under **Section 84(1)** of the **Constitution** the High Court, in deserving cases, shall grant redress for contravention of the provisions of **Sections 70 to 83 (inclusive)** but the redress shall be subject to respect for the rights and freedoms of others and to public interest.

12. I have considered the Submissions on this point and I am inclined to agree with the Respondent on that fundamental point. **Section 84(1)** and **(2)** of the **Repealed Constitution** provides as follows;

***“(1) Subject to subsection (6), if a person alleges that any of the provisions of Sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.***

***(2) The High Court shall have original jurisdiction –***

***(a) to hear and determine an Application made by a person in pursuance of Sub Section (1);***

***(b) to determine any question arising in the case of a person which is referred to it in pursuance of Sub Section(3), and may make such Orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Sections 70 to 83 (inclusive).”***

13. The original jurisdiction conferred on the High Court is in addition to the jurisdiction conferred by **Section 60(1)** of the same **Constitution** which provides as follows;

***“(1) There shall be a High Court, which shall be a Superior Court of record, and which shall subject to Section 60A have unlimited original jurisdiction in Civil and Criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other Law.”***

14. From what I have reproduced elsewhere above, the dispute between the parties is really an industrial one i.e.; whether the Petitioner was entitled to payment of his salary and other benefits during the period of his suspension.

15. The dispute could therefore have been handled in the ordinary Civil Courts and I see no pressing reason why it was clothed as a reference under the Constitution, although I will say something in that regard later in this judgment. I am also persuaded by the reasoning in Alphonse Mwangemi Munga vs. African Safari Club [2008]eKLR where it was held as follows and in agreement with the holding in Haarikisoon vs. Attorney General of Trinidad and Tobago [1980] AC 265.

***“The notion that wherever there is a failure by an organ of government or a public authority or public officer to comply with the Law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The***

***Right to apply to the High Court under Section 6 (our Section 84) of the Constitution for redress when any human right or freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures of invoking judicial control of administrative action. The mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the Applicant to invoke the jurisdiction of the Court under the Section if it is apparent that the allegation is frivolous, vexatious or abuse of the process of Court, as being solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”***

16. The above reasoning is attractive because it is obvious to me that the Petitioner sat on his laurels from the years 2000 to 2009 and did nothing in a simple claim for payment of monies allegedly due to him. The present Petition is nothing more than an attempt at avoiding the limitation of time in contract matters because it is now settled that there is no limitation, save in exceptional circumstances, in the enforcement of fundamental rights and freedoms (see Dominic Arony vs. Republic H.C. Misc. Application No.494/2003).

17. I am emphatic in this finding because in a letter dated 8<sup>th</sup> May 1996, the Registrar (Administration) of the Respondent University, stated as follows;

***“During the period of suspension, you will not be paid basic salary until your case is deliberated and determined by the Senior Staff Disciplinary Committee ...”***

18. In another letter addressed to M/s Kamau Kuria & Kiraitu Advocates acting for the Petitioner, the Respondent stated as follows;

***“As for the issue of his salary, we shall revert to you shortly. In the meantime, do assure your client that if he is found innocent, he shall receive his full salary in arrears”***

19. The above undertaking was clear and unequivocal. **Why did the Petitioner not pursue it within the limits set by the Law of contract?** I would have expected an explanation but I have seen none. **Section 4 of the Limitation of Actions Act, Cap.1** of the Laws of Kenya provides as follows;

***“(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued –***

***(a) actions founded on contract;***

***(b) actions to enforce a recognizance;***

***(c) actions to enforce an award;***

***(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;***

***(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.”***

20. The claim by the Petitioner was obviously one which was statute time barred six years after his suspension was lifted on 15<sup>th</sup> March 2000 and could not be sustained in 2009 when the present Petition was filed. I am actually surprised at the Petitioner’s indolence because he retained a firm of advocates, the same one during the suspension proceedings and in the present proceedings, and he ought to have been advised on the cause of action to take. The letter of 15<sup>th</sup> March 2000 reinstating him to employment stated partly as follows;

***“However, the withheld half salary during the period of suspension will not be paid back to you (sic)”***

21. It is obvious to me what the Petitioner should have done within the Law and at the right time and I am not satisfied that by clothing his claim as a violation of constitutional rights, the Petitioner's actions of avoiding limitation of time set by Law should be upheld.

22. I also agree with the Respondent on another fundamental principle of Law; that private Law matters should not be dubbed constitutional violations. In Teitinnang vs. Ariong [1987] LRC (Const).517, it was powerfully held as follows;

***“Dealing now with the question, can a private individual maintain an action for declaration against another private individual or individuals for breach of fundamental rights provisions of the Laws? The rights and duties of individuals, and between individuals, are regulated by private Laws. The Constitution, on the other hand, is an instrument of government. It contains rules about the government of the country. It is my view, therefore that the duties imposed by the Constitution under the fundamental rights provisions are owed by the government of the day, to the governed. I am of the opinion that an individual or group of individuals, as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals. Since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of the Constitution, no action for a declaration that there has been a breach of duty under that provision can lie or be maintained in the case before me, and I so hold.”***

23. I wholly agree and it ought to be obvious that matters of private Law should be dealt with in ordinary Civil Courts and not taken to the High Court in its mandate under **Section 84** of the **Repealed Constitution**. This is what led the Court in Abraham Kaisha Kanzika & Anor vs. Governor, Central Bank of Kenya [2006] eKLR to express itself thus;

***“In my view failure by a Constitutional Court to recognize general principles of Law including, limitation expressed in the Constitution would lead to legal anarchy or crisis. It would also trivialize the constitutional jurisdiction in that Applicants would in some case ignore the enforcement of their rights under the general principles of Law in order to convert their subsequent grievance into a “constitutional issue” after the expiry of the prescribed limitations periods ...”***

24. I agree and in holding as I have done above, I am quite alive to the principle that the existence of an alternative remedy is no bar to the enforcement of a fundamental right under **Section 84(1)** of the **Constitution**. See Abraham Kaisha Kanzika (supra).

25. However, where it is obvious to the Court such as in this case, that in fact the invocation of **Section 84(1)** is intended to circumvent operative provisions of the Law, then the *mala fides* exhibited renders the entire proceeding an abuse of Court process and thus unsustainable.

26. **But suppose I am wrong and in fact there is something to be said of the whole claim and that in fact there were violations of fundamental rights?** In that case, my holding would be that in pleading violations of rights and freedoms, the mere lamentation that there are or were violations is not enough. To claim that the Petitioner was held in servitude when he was roaming, at home and at work and earning half his salary is to ridicule those, like the victims of the Nyayo House Torture Chambers, who actually faced such situations. To say that the Petitioner was subjected to degrading and inhuman treatment merely because he was sent on suspension is to joke about the likes of Dominic Arony in the Arony Case (supra) who were really treated as such. To shout that the Petitioner was deprived of his property (*read his money*) is to laugh at those like the Internally Displaced Persons of Kenya who really lost all they had as property for no fault of theirs.

27. The Petitioner, I have shown, had the opportunity and the means to claim his money back but once he was reinstated to employment, he earned more money from the Respondent and woke up nine (9) years later when the Law had rendered his claim impotent.

28. To claim as does the Petitioner, that he was subjected to arbitrary and capricious exercise of power is

to use high sounding Constitutional phrases without breathing any life into them. The Petitioner was heard, found innocent and reinstated to employment and even given contractual terms beyond his retirement age. He can hardly have reason to complain, in that regard as his employer was actually generous to him.

29. Having said all the above, the only issue that I deem fit to address is the fact that one, Mr. M'Inoti was not allowed to represent the Petitioner in proceedings before the Senior Staff Disciplinary Committee. That right must however be looked at in the broader sense i.e. in the application of the *audi alteram partem* Rule. I say so because the right to be heard is embedded within the right to representation. My understanding of the Law however is that fundamental as that right may be, it does not apply in the same manner to non-judicial proceedings as in judicial proceedings. The administrative hearing by the Committee aforesaid cannot be a judicial proceeding. In Annesthesia Intensive Care and Emergency Medical (Pty) Ltd vs. MRI Botswana Ltd. C. A. Civil Add. 033/04 the Court of Appeal in Botswana, it was held as follows;

***“Housing Corporation vs. Rabana [1997] B.L.R. 106 is the authority for the proposition that the Appellant was entitled to be heard before the Respondent took the decision to terminate the contract.***

***In the opening words of his judgment at page 107 Tebbutt J. A. recorded that “Appellant is a body corporate created by statute viz the Botswana Housing Corporation Act No.75 of 1970 as amended.” The Respondent was an employee of the Appellant whose employment appeared to be bound by the Appellant’s standard terms and conditions of service. The Court held that in the circumstances of that case the audi alteram partem principle did not require the holding of an oral hearing such as that for which the Respondent contended. At page 121 D to page 122 A Tebbutt J. A as he then was, set out the principles involved with such lucidity that no attempt at condensation or paraphrasing could replicate the clarity of the passage.***

***Accordingly I set it out in full for the benefit of the parties, their legal advisers and for all those who are interested in this area of the Law, for whatever reason.***

***“The principle is one of the most ancient in jurisprudence. In South Africa, whose judicial decisions and utterances are of persuasive value in this country, Colman J. in Heatherdale Farms (Pty) Ltd. vs. Deputy Minister of Agriculture 1980 (3) S.A. 476 (T) at 486D-E said in regard to it;***

***“It is clear on the authorities that a person who is entitled to the benefit of the audi alteram partem rule need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral hearing, or allowed representation by an Attorney or Counsel; he need not be given the opportunity to cross-examine; and he is not entitled to discovery of documents.”***

***Consonant with the foregoing it has been held that the Rules of natural justice do not require a domestic tribunal to “apply the technical Rules of evidence observed in a court of law to hear witness orally, to permit the person charged to be legally represented ... or to call witnesses or to cross-examine witnesses” (see Meyer vs. Law Society Transvaal 1978 (2) S.A 209 (T) at 213A-B and authorities there cited). The body concerned is entitled to determine its own procedure, provided it complies with the applicable contractual provisions. As was stated by the Court in Herring vs. Templeman and Others [1973] All E.R. 569 (C.A.) at 587G;***

***“The governing body is master of its own procedure. Its members are not judges in a Law Court, nor are they legal arbitrators. They are entitled to such flexibility in their procedure as they think their particular case under consideration requires.”***

***As pointed out above, Appellant’s conditions of service also provide for flexibility in its procedures. What is required is that in reaching its decision the employer must apply its mind honestly to the issue and that its procedures must be fair. Fairness in turn requires that the employee should be given an opportunity to meeting the case against him (see National Transport Commission and Another vs. Chetty’s Motor Transport 1972 (3) S.A. 726 (A) at 735; Slagment (Pty) Ltd. vs. Building***

**Construction and Allied Workers Union and Others 1995 (1) A. A. 742 (A) at 755B C; Davies vs. Chairman, Committee of the Johannesburg Stock Exchange 1991 (4) S. A. 43 at 48D-E”.**

30. The decision above is in all fours with the issue before me and I adopt the above words as if they were mine.

31. It is clear to me in any event, that the non-appearance of Mr. M’Inoti caused no prejudice to the Petitioner who was ultimately found innocent and reinstated to his employment.

32. In the end therefore, I see no reason to find that any of the fundamental rights and freedoms cited by the Petitioner have been infringed upon and I have chosen to say nothing of the substance of the claim for Kshs.18 million and the reasons are obvious from the foregoing.

**33. Conclusion**

Parties should not use the sacrosanct Bill of Rights in our Constitution to pursue ends that do not meet its expectations. This Court will grant Orders to deserving litigants but will in equal measure turn away those that abuse its processes and the limits set by the Law.

34. The Petition dated 13<sup>th</sup> October 2008 falls in the latter category and is dismissed with costs to the Respondent.

35. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 2<sup>nd</sup> DAY OF AUGUST, 2012**

**ISAAC LENAOLA  
JUDGE**

**In the presence of:**

*Irene – court clerk*

*Mr. Okindo hold brief for Mr. Gacheru for Petitioner*

*Mr. Imende for Respondent*

**Order**

*Judgment duly read.*

**ISAAC LENAOLA  
JUDGE**

**By Consent**

*Leave to appeal is granted and copies of the judgment to be supplied.*

**ISAAC LENAOLA  
JUDGE  
2/8/2012**