



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.509 OF 2013

BETWEEN

PHILIP JALANGO.....PETITIONER

AND

MWANGI MUTHEE (*Sued in capacity as the Chairman of the KENYA*

RUGBY UNION1ST RESPONDENT

JACK OKOTH (*Sued in capacity as the Secretary of the KENYA*

RUGBY UNION2ND RESPONDENT

JUDGMENT

Introduction

1. The Petition dated 28th March 2013 was filed by the Petitioner, Philip Jalango, to challenge his suspension as a member of the Board of the Kenya Rugby Union (hereinafter “*the Union*”) and as the Chairman/Director of the Elite Performance and National Squads management Sub-Committee of the said Union.
2. The Union is a society registered under the **Societies Act, Cap.108 Laws of Kenya** hence the joinder of the Registrar of Societies as an Interested Party. The Petitioner seeks the following prayers in his Petition;

“(a) The suspension of the Petitioner in his capacity of board member of the Kenya Rugby Union was illegal and void ab initio and in breach of Article 47 of the Constitution; and

(b) The suspension of the Petitioner by the Respondents in his capacity as Chairman/Director of the Elite Performance and National Squads Management Sub-committee was in breach of Articles 27, 47 and 35(2) of the Constitution.

(c) A declaration that the actions of the Respondents in this cause violated the Petitioner's constitutional rights under Articles 27, 35(1)(b) and (2), 36(1), 47, 50(1) and (2) of the Constitution of the Republic of Kenya.

(d) By way of mandatory injunction directed at the Respondents, the suspension of the Petitioner as a board member and as a Chairman/Director of the Elite Performance and National Squads Management sub-committee be revoked and lifted immediately and unconditionally.

(e) This Honourable Court do grant compensation for the breach of the Petitioner's constitutional rights, at an amount to be assessed by this Honourable Court

(f) The Honourable Court do order that the costs of this Petition be borne by the Respondents in any event.

(g) Such other orders as this Honourable Court shall deem fit and just to grant in the circumstances.”

Petitioner's Case

3. On 29th October 2013, I granted interim orders limited to the Petitioner being allowed to participate in a special general meeting of the Union scheduled for 30th October 2013 and to participate in all other activities of the Union until further orders of the Court.
4. In the Petition, Supporting Affidavit and Submissions by Mr. Nyaribo, learned Counsel for the Petitioner, the background to the Petitioner's case is as follows;
 - (i) On 29th March 2012, he was *elected* as a Board member of the Union for a term of two years under **Article 10.2.2** of the **Union's Constitution**.
 - (ii) On 3rd May 2012, he was *appointed* by the Board aforesaid as Chairman/Director of a standing committee known as the *Elite Performance and National Squads Management sub-Committee*.
 - (iii) On 27th May 2013, the Union's Chairman wrote a letter to him and stated that the Board had suspended him from membership of the same Board and from all sanctioned activities of the Union.
 - (iv) Simultaneously with the letter, the Chairman issued a press statement where it was stated that the Petitioner had also been suspended from the Sub-Committee above and his place as Chairman/Director taken by one, Gabriel Ouko. Subsequently, Kenyan local dailies carried stories of the suspension under articles like, “Jalang'o fired” and “Hunter is now Hunted”.
5. It is thus the Petitioner's case that all the above actions were actuated by malice and were intended to embarrass him and lower his esteem before right thinking members of Society. Further, that his attempts at having the dispute resolved amicably by the Unions' Appeals Committee failed when the Chairman of the Union declined to participate in any arbitration process.
6. It is his further case that the proceedings of 27th May 2013 at which a resolution to suspend him was arrived at, was in contravention of **Articles 10.8 and 10.2.2** of the **Union's Constitution**; was in breach of **Article 47** of the **Constitution** which protects the right to fair administrative action; was in breach of **Article 27** of the **Constitution** which provides for the right to equality and freedom from discrimination; was in breach of **Article 35(2)** of the **Constitution** which provides for the right to correction or deletion of untrue or misleading information that affects the person; was in breach of **Article 35(1)** on the right to access information generally; was in breach of **Article 36(1)** on the freedom of association and was also in breach of **Article 50(1)** and **(2)** on the right to a fair hearing.
7. All the particulars of breaches are well articulated at paragraphs 30, 32, 35, 39, 42, 45 and 47 of the Petition. The prayers sought as a consequence of the alleged breaches and violations have

been set out elsewhere above.

Respondents' and Interested Party's Cases

8. Although both Respondents as the Chairman and Secretary of the Union were served with the Petition, by the time I retired to write this Judgment, no response was filed by either of them. I note however that one, Mr. Anami, Advocate, appeared for them once when the matter was mentioned before Mumbi Ngugi, J. and indicated that parties were engaged in negotiations to settle the matter. He never appeared in Court again and it is unclear how far the negotiations went.
9. The Interested Party was similarly properly served but filed no response to the Petition.
10. In the end, I only have the Petitioner's side of the story and as is my duty, I shall proceed and determine the Petition on the basis of the facts before me and the applicable law.

Determination

11. I have read the Submissions by Mr. Nyaribo, learned Counsel for the Petitioner and I note that it is his case that since the Petition is unopposed, then all the orders sought should be granted. On my part, I agree that on the facts, since there is no opposition to the chronology of events as pleaded by the Petitioner, I will take them as they are and therefore proved to the required standard.
12. The next question to address is whether the facts also point to a violation of the Petitioner's rights as enumerated elsewhere above.
13. To his credit, the Petitioner did something few litigants often do; in line with the decision in **Anarita Karimi vs AG [1979] KLR 54**, he specifically cited a right that he claims was violated and specifically pleaded the actual act(s) that he claims formed the basis for the violation. I will here below address each complaint/violation as framed and argued.

The Right to Fair Administrative Action under Article 47 of the Constitution

14. It is the Applicant's submission that under **Article 47** of the **Constitution**, he was entitled to a reasonable opportunity to present his case before the suspension was effected and that he also had a right to know his accusers and to be subjected to the disciplinary process under the Union's Constitution.
15. In that regard, it should be noted that the Petitioner was elected to the Union's Board for a two year term ending on 29th March 2014. **Clause 10.12** of the **Union's Constitution** provides that;

“An Officer or Board member shall automatically cease to be such if:

(a) He fails to attend three consecutive meetings of the Board without proper cause.

(b) He is removed from the office at a General Meeting of the Union by a resolution passed by a two-thirds majority of the votes of representatives of Members present.”

16. I have read the letter dated 27th May 2013 from the Chairman of the Union and in suspending the Petitioner, no reference was made to any Clause in the Union's Constitution that allowed such an action. I have seen no such provision save that **Article 10.23** grants the Board power to “*take such steps as it may deem fit against any Club, Rugby Body, player or person in terms of this Constitution, for failing to comply with or contravening the Constitution, any of the By-Laws, rules and/or regulations of the Union....*” The said provision does not however mention disciplinary action against a member of the Board and so only **Clause 10.12** properly applies to

such a member.

17. It is obvious from the evidence before me that the Petitioner had no notice of any charges against him; was not told which law empowered the Board (of which he is a member) to take the action it took against him; was not given a chance to be heard and so the action was both unlawful and unwarranted. **Article 47** of the **Constitution** provides that;

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration. ”

18. In furtherance of the law above, I was referred to the following decisions in support of the Petitioner's case and which I agree are a proper exposition of the right enshrined in **Article 47** of the **Constitution**;

(a) **Pashito Holdings & another vs Ndung'u and 2 Others C.A No.138/1997 (V.R.)** where the Court of Appeal stated thus;

“The rule of audi alteram partem, which means 'hear the other side', is a rule of natural justice. It is an indispensable requirement of justice that the party who has to make a decision shall hear both sides, giving each an opportunity of hearing what is urged against him.”

The Petitioner was clearly not given a hearing before his suspension and I so find.

(b) **Kazungu & Another vs NSSF, Petition No.703 of 2010** where it was held that;

“The fundamental principles of natural justice are that a person affected by a decision will receive notice that his or her case is being considered. Second, they will be provided with the specific aspects of the case that are under consideration so that an explanation or response can be prepared and thirdly, they will be provided with the opportunity to make submissions to the case.”

The Petitioner had no notice of the charges, if at all, that led to his suspension and I so find.

(c) **Multiple Hauliers E.A Ltd. versus The Attorney General and 11 Others, Petition No.88 of 2010** where the Court stated thus;

“This Court has on several occasions emphasized the need for administrative action to be carried out procedurally. Where a public authority's actions are likely to deprive individuals of their fundamental rights and freedoms, it is crucial that such actions be carried out through due process and in respect of the rules of natural justice.”

No doubt the rules of natural justice were not adhered to by the Respondents before suspending the Petitioner and I so find.

19. Applying therefore the facts and the law as expressed above, I can only reach the conclusion that the Petitioner's rights under **Article 47** of the **Constitution** were violated.

Right to Equality and Freedom from Discrimination under Article 27 of the Constitution

20. It is the Petitioner's argument in this aspect of his case that failure to provide a disciplinary mechanism known to the Union's Constitution; appointing another person to his position as Chairman of the Elite performance and national Squads Management Sub-Committee; suspending him from an elected position without following due process, all constituted a breach of **Article 27** of the **Constitution** which provides as follows;

“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. ”

21. With respect to the Petitioner, all arguments made above relate more to breach of **Article 47** above and not **Article 27** thereof.

22. I have for example seen no evidence that any other member of the Union's Board received differential treatment in circumstances similar to the Petitioner and it is unclear to me how the above right was violated.

23. I therefore find no violation of **Article 27** of the **Constitution** and the Petitioner's contentions in that regard are dismissed.

Right to access information under Article 35 of the Constitution

24. The only relevant point made with regard to the above subject was that the Respondents failed to give the Petitioner copies of the Minutes of the Board's meeting held on 27th May 2013 in contravention of his rights under **Article 35(1) (b)** of the **Constitution** which provides as follows;

“(1) Every citizen has the right of access to—

(a) ...

(b) *information held by another person and required for the exercise or protection of any right or fundamental freedom.* ”

25. In her decision in Nairobi Law Monthly Co. Ltd vs Kenya Electricity Generating Company & 2 Others (2013)eKLR, Mumbi J. stated as follows;

“The recognised international standards or principles on freedom of information, which should be included in legislation on freedom of information, include maximum disclosure; that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that 'information' should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information.”

26. I agree with the learned Judge and in applying the holding to the present case, I wish to state that the Minutes of the meeting at which the Petitioner was suspended would have been useful in defending his right to be heard before drastic action was taken against him. I agree therefore that taking the law as expressed above, his rights under **Article 35(1)(b)** of the **Constitution** was violated.

Right to Freedom of Association under Article 36(1) of the Constitution

27. It is the Petitioner's argument in this regard that his suspension from the Board disentitled those who elected him to his representation in the Board and the suspension was in any event unlawful.

Article 36(1) of the **Constitution** provides as follows;

“(1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind. ”

28. I think that looking at the above provision, it is obvious that the unlawful suspension of the Petitioner from engaging in the activities of a board to which he was lawfully elected, was a violation of his right to association and without belabouring the point, his claims in that regard must be upheld save that the alleged breach of the right to those who elected him was far-fetched and is not supported by any evidence.

Right to a Fair Hearing under Article 50(1) and (2) of the Constitution

29. The Petitioner has urged the point that failure to accord him a hearing prior to his suspension was a violation of his right to a fair hearing and specifically, the Respondents failed to present him with a notice of the charges that led to his suspension. Further that the Respondents failed to participate in mediation/arbitration proceedings under the Union's Constitution and thereby caused him grave injustice.

Article 50(1) and **(2)** of the **Constitution** provides as follows;

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) *Every accused person has the right to a fair trial, which includes the right—*

(a) *to be presumed innocent until the contrary is proved;*

- (b) *to be informed of the charge, with sufficient detail to answer it;*
- (c) *to have adequate time and facilities to prepare a defence;*
- (d) *to a public trial before a court established under this Constitution;*
- (e) *to have the trial begin and conclude without unreasonable delay;*
- (f) *to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;*
- (g) *to choose, and be represented by, an advocate, and to be informed of this right promptly;*
- (h) *to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;*
- (i) *to remain silent, and not to testify during the proceedings;*
- (j) *to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;*
- (k) *to adduce and challenge evidence;*
- (l) *to refuse to give self-incriminating evidence;*
- (m) *to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;*
- (n) *not to be convicted for an act or omission that at the time it was committed or omitted was not—*
 - (i) *an offence in Kenya; or*
 - (ii) *a crime under international law;*
- (o) *not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;*
- (p) *to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and*
- (q) *if convicted, to appeal to, or apply for review by, a higher Court as prescribed by law. ”*

30. In applying the law above and regarding the right to procedural fairness during any hearing, in **Geothermal Development Company Ltd. vs Attorney General & Others, Petition No.352/2012**, it was stated as follows;

“in many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be.”

31. Further, in **Kiereini vs Capital Markets Authority & Another, Petition No.371 of 2012**, the Court emphatically stated thus;

“The right of a man to be given a fair opportunity of hearing what is alleged against him and of presenting his own case is so fundamental to any civilised legal system that it is to be presumed that Parliament intended that a failure to observe it should render null and void any decision reached in breach of this requirement”

32. I agree with the rendition of the law as above and having previously held that the Petitioner was never given notice of any charges against him and the decision to suspend him having been wholly arbitrary, then his right to a fair hearing was breached.

However, in holding as I have done above, it is my finding that **Article 50(2)** is inapplicable to the present case because the right enshrined therein is limited to proceedings in a trial Court and not a body such as the Union herein. This was the holding by the Court of Appeal in **Mbugua vs Republic Cr. Appl. No.50 of 2008** and which I am bound by.

Other provisions of the Constitution

33. The Petitioner alleged violations of **Articles 2(4)** of the **Constitution** – nullity of actions that are inconsistent with the Constitution; **Article 3(1)** of the **Constitution** – obligation to respect, uphold and defend the Constitution and **Article 10(1), 2(c)** of the **Constitution** – national values and principles. They provide as follows;

Article 2(4)

“(2) (1) ...

(2) ...

(3) ...

(4) ***Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”***

Article 3(1)

“(3)(1) ***Every person has an obligation to respect, uphold and defend this Constitution.”***

Article 10(1), 2(c)

“(10)(1) ***The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—***

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

“(2) ***The national values and principles of governance include—***

(a) ...

(b) ...

(c) good governance, integrity, transparency and accountability.”

1. In interpreting some of the above provisions, the Court in **Wang'ondu & 7 Others vs Coffee Board of Kenya & Another, Petition No.255/2011**, stated as follows;

“Articles 10 sets out the national values and principles of governance. These values are not merely statements or directives of state policy but are an integral part of the application of the provisions of the Constitution and must be given legal effect.”

2. Further in **COFEK vs AG & Others, Petition No.11/2012**, the Court expressed itself as follows;

“While I agree with Counsel for the 3rd Respondent that the values contained in Article 10 of the Constitution may not be of themselves justiciable, it must be remembered that a Constitution devoid of values and principles is like an empty tin. These values are what give real meaning to the dry letter of the law and provide a vision of the kind of society we would all like to build. They must be given full effect by every person and authority at all times.”

3. I am persuaded by the above reasoning and where a party acts brazenly, ignores all the principles that require fairness and transparency in its actions, then those actions are a violation of the tenets and principles on which our Constitutional order are founded. I find in favour of the Petitioner in that regard.

Remedies

4. The Petitioner has sought declarations in terms of prayers reproduced above. I have already determined the substance of those prayers and the only remaining prayer is prayer (d) relating to compensation for breach of fundamental rights as well as costs and any other prayers that this Court may deem fit to grant.
5. In that regard, the present proceedings relate to the enforcement of fundamental rights under **Article 22** of the **Constitution** and the reliefs thereof are to be found in **Article 23(3)** of the **Constitution** which provides as follows;

“(1) ...

(2) ...

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review. ”

6. Regarding an order for compensation, Mr. Nyaribo referred me to the case of **Wanjohi vs AG & Others, Pet.154/2011** where Majanja J. upon finding a breach of **Article 47** of the **Constitution**

granted the Petition an award of Kshs.1 Million as compensation.

7. As I understand it, payment of compensation is ordered to recompense an injured party for an injury sustained and is meant to make the injured person whole again – **see Black's Law Dictionary, 9th Edition.**
8. What injury has the Petitioner in the present case suffered that would entitle him to compensation? Compensation is not an automatic remedy when certain rights have been violated. It is based on strict liability and is in addition to the remedy in private law for damages for the tort resulting from the contravention of fundamental rights – See **Chaudhari Chaturvedi's Law of Fundamental Rights, 4th Edition at page 906.**
9. It is my considered view that whereas the actions of the Respondents have been shown to be in violation of the Constitution, the Petitioner was allowed by order of this Court to participate in all activities of the Union from the day he first came to Court and that order certainly mitigated his losses. His term as a Board member would have ended by the time this Judgment is delivered and fresh elections would have been held. In the circumstances, I am certain that an order of compensation would be unduly prejudicial to the Respondents and it is not in the interests of the Parties to make such an order.
10. As for costs, the Parties herein are all members of the Union and sit on its Board. To order costs against the Respondents would be divisive and would prejudice the need for a harmonious working relationship amongst members of the Board and the greater Union. Let each Party bear its costs therefore.

Conclusion

11. The Petition, undefended as it is would require that I make the following final orders;

- “(a) The suspension of the Petitioner in his capacity of board member of the Kenya Rugby Union was illegal and void ab initio and in breach of Article 47 of the Constitution; and***
- (b) The suspension of the Petitioner by the Respondents in his capacity as Chairman/Director of the Elite Performance and National Squads Management Sub-committee was in breach of Articles 35(2) and 47 of the Constitution.***
- (c) A declaration that the actions of the Respondents in this cause violated the Petitioner's constitutional rights under Articles 35(1)(b) and (2), 36(1), 47 and 50(1) of the Constitution of the Republic of Kenya.***
- (d) By way of mandatory injunction an order is issued directed at the Respondents, that the suspension of the Petitioner as a board member and as a Chairman/Director of the Elite Performance and National Squads Management sub-committee be revoked and lifted immediately and unconditionally. (If this has already not been done).***
- (e) Each Party shall bear its own costs.”***

12. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 4TH DAY OF JULY, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Miss Cherono holding brief for Mr. Nyambu for Petitioner

No appearance for Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE