



Kang'ethe v Rural Electrification & Renewable Energy Corporation (Petition E007 of 2024) [2024] KEELRC 1274 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1274 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E007 OF 2024**

B ONGAYA, J

MAY 24, 2024

**IN THE MATTER OF ARTICLES 23, 41, 47, 48 AND
159 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF VIOLATION OF ARTICLES
25, 27, 29, 41, AND 47 OF THE CONSTITUTION**

**IN THE MATTER OF SECTIONS 4 AND 7 OF THE
FAIR ADMINISTRATIVE ACTION ACT, 2015**

BETWEEN

ALEX NJOROGE KANG'ETHE PETITIONER

AND

**RURAL ELECTRIFICATION & RENEWABLE ENERGY
CORPORATION RESPONDENT**

JUDGMENT

1. The petitioner is Alex Njoroge Kang'ethe. He is a public officer in the employment of the respondent state corporation. He filed the petition dated 22.01.2024 through Frank Karanja & Company Advocates. He prayed for:
 - a. A declaration that the respondent's letter reference no. RE2018/0425 dated 06.12.2022 violates the petitioner's right to fair administrative action under Article 47(1) of the Constitution and section 4(3)(b) of the Fair Administrative Action Act, 2015 given that it communicated the culpability of the petitioner and indicted him of major and gross misconduct before affording him an opportunity to be heard and make representation.
 - b. A declaration that under clause 13.21.2(viii) of the respondent's human resource policy and procedure manual of 2019 the duration of an interdiction is a period of six (6) months and the



national values and principles of rule of law, good governance, transparency and accountability under Article 10 of the *Constitution* enjoin the respondents to not subject an employee to any interdiction beyond the stated 6 months.

- c. A declaration that by subjecting the petitioner to an interdiction beyond the period of 6 months prescribed under clause 13.21.2(viii) of the respondent's human resource policy and procedure manual of 2019 the respondents have violated the petitioner's right to fair labour practices under Article 41 of the *Constitution* and further violated the national values and principles of good governance, transparency, accountability and rule of law under Article 10(1) and (2) of the *Constitution*.
- d. A judicial review order of mandamus be issued against the respondent compelling the respondent to unconditionally lift the petitioner's interdiction and or suspension as contained in the letter reference no. RE2018/0425 dated 06.12.2022 and reinstate him to his position of Manager, Information Communication and Technology with full salary and benefits with immediate effect.
- e. A judicial review order of certiorari to be issued against the respondent quashing the whole and entire decision contained in the letter reference number RE2018/0425 dated 06.12.2022 on the basis that it violates Articles 10, 27, 29, 41, and 47 of the *Constitution* and the provisions of the *Fair Administrative Action Act*, 2015.
- f. A judicial review order of prohibition to prohibit the respondent permanently from subjecting the petitioner to any disciplinary or adverse administrative action based on the contents of the letter reference no. RE2018/0425 and 06.12.2022 on the basis that it violates Articles 10, 27, 29, 41, and 47 of the *Constitution* and the provisions of the *Fair Administrative Action Act*, 2015.
- g. A declaration that the respondent has discriminated against the petitioner by singling him out as solely responsible for shutting down the respondent's SAP system as particularised in letter reference number RE2018/0425 dated 06.12.2022 and subjecting him to a disciplinary action in breach of Article 27(1) of the *Constitution* given that the decision in question was in fact made by five members of the respondent's Steering Committee that included its Chief Executive Officer and General Managers against whom no adverse action was initiated.
- h. A judicial review order of mandamus be issued against the respondent compelling the respondent to release all withheld salary, allowances and benefits owed to the petitioner with interest at Court rates unconditionally with immediate effect and in default of which execution to issue.
 - i. A declaration that the delay in the disciplinary process and interdiction that the respondent has subjected the petitioner to by dint of the letter reference no. RE2018/0425 dated 06.12.2022 is not only inordinate but is also inexcusable and violates the national values and principles of governance of accountability, good governance, transparency, rule of law and integrity under Article 10 of the *Constitution* and the right to administrative action that is expeditious, efficient, lawful and procedurally fair under Article 47 of the *Constitution*.
- j. A declaration to issue that the petitioner is entitled to compensation and damages for violation of his rights and fundamental freedoms under Articles 10, 25, 27, 29, 41 and 47 of the *Constitution*.
- k. Interest at Court rates.



1. An order that the costs of the petition be provided for by the respondents.
2. The petition is based upon the petitioner's supporting affidavit sworn on 22.01.2023, his supplementary affidavit sworn on 04.03.2024; and further affidavit sworn on 24.04.2024.
3. The respondent opposed the petition by filing the replying affidavit of CHRP Sophia Githuku, the respondent's General Manager, Human Resource and Administration, sworn on 19.02.2024 and filed through the Honourable Attorney General and learned Counsel Ms. Oyugi appeared in that behalf. The respondent filed the further replying affidavit of Evelyn Koech, Manager, Human Resource Department, sworn on 25.03.2024; the further replying affidavit of Fred Ishugah, General Manager, Renewable Energy, Research and Development Directorate, and acting CEO from 08.08.2022 to 13.09.2022, sworn on 25.03.2024; and John Otindo, Principal ICT Officer, sworn on 25.03.2024.
4. The Court has considered the affidavits and annexed exhibits filed for parties. The facts of the case are disclosed as follows:
 - a. The respondent employed the petitioner as the Manager, Information Communication Technology (ICT) Job Group REA 3 on permanent and pensionable terms and his current gross monthly salary is Kshs. 425, 900.00.
 - b. The petitioner received the letter to show cause dated 06.12.2022. The letter stated in part thus, "It has been reported that on 08.08.2022, you issued instructions to shut down the SAP System thereby hampering the Audit that was being undertaken and the delivery of services in the Corporation. It has further come to the attention of the Corporation that you disclosed information concerning the affairs of the Corporation. Particularly, that you recorded the proceedings of a board meeting held on 24th August, 2022 and disseminated the same without authorisation and which proceedings of the meeting are confidential as it relates to the affairs of the Corporation." The letter further and in part stated as follows, "The Corporation finds you in contravention of Section 44 (c) of the Employment Act, 2007 which stipulates that an employer may prefer gross misconduct proceedings against an employee where an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his his duty, under his contract, to have performed carefully and properly. Further, your actions constitute disciplinary offences as contained under clause 13.16.1 of the Corporation's Human Resource Policy and Procedures Manual 2019 clauses (b) (vi), and (c) (i), (iv), (viii), (x), (xviii), (xxiv), which amount to both major and gross misconduct." The letter invited the petitioner to present his written representation on why disciplinary action should not be taken against him on account of the actions set out. His response was to reach the respondent within 7 days from the date of the letter and not later than 13.12.2022 at 4.30p.m. The letter further conveyed that the respondent's board at the meeting of 05.12.2022 had resolved to interdict the petitioner from duty effective the date of the letter and he was to immediately hand in the respondent's allocated laptops, ipads, keys to safes and other critical gadgets under his care. The letter further stated thus, "During the period of your interdiction, you shall be entitled to half of your basic salary, full house allowance and medical entitlement."
 - c. The petitioner replied to the show cause letter by his letter dated 08.08.2022 corrected in ink as 08.12.2022. as relates to shut down of the SAP system, he respondent that he was implementing an express decision of the steering committee thus, " On the Steering Committee meeting dated the same day 8th August 2022 that started at 3.30p.m at the CEO's boardroom (minutes attached) gave an authority on min/07/08, 'That access to the SAP by



all staff to be made unavailable on Tuesday 9th August 2022 (General Elections day) and to be activated on Wednesday 10th August 2022 at 8.00am’ please see the minutes screen shot below.” After the resolution he proceeded to instruct the system administrators in the ICT Department to shut down the SAP system procedurally. Further the shut down happened past the working hours on 8th August 2022. He sought authority from the then acting CEO to power on the system and the SAP system was powered back on 10th August 2022. He attached a screen shot of the email on authority to power back the system. Thus in his capacity as ICT Manager, he had not in any way hampered the audit process. With respect to the second allegation, explained the chronology of the events of the zoom meeting of 24.08.2022, how it may have been recorded, his frantic and prompt steps to delete the cloud zoom recording, and, concluded that from the chronology of the events, he confidently confirmed without doubt that he did not record, share, or disseminate the board recordings to anybody in any way or form whatsoever. He requested the respondent’s board of directors to reach a decision favourable to him as a diligent worker who had served with integrity.

- d. It is the respondent’s case that the petitioner’s explanation was found unsatisfactory and he was invited to a disciplinary hearing held on 22.12.2022 for oral hearing, which the petitioner attended and made an oral presentation before the Human Resource Committee of Respondent’s board.
- e. The respondent’s further case is that after the hearing, the petitioner was informed that his representation would be deliberated before the full board in its quarterly sitting and the decision taken would be communicated to him in due cause. The respondent further states that the respondent board was to sit on 28.02.2023 but did not do so because the Cabinet Secretary, Ministry of Energy by gazette notice no. 2378 of 2023 dated 24.02.2023 reconstituted the board whereby three out of four HR Committee Members were removed from the respondent’s board. The new board at its first sitting on 16.03.2023 agreed to reconstitute the Board Committees. The respondent’s further case is that the board on 16.03.2023 the board resolved to refer the petitioner’s disciplinary case to the reconstituted respondent board’s Human Resource Committee especially that the minutes of the disciplinary meeting and hearing before the former Human Resource Committee on 22.12.2023 had not been signed. The decision to rehear the case was consistent with clause 13.27.2(d) which states that the Human Resource Committee report or minutes must be signed.
- f. Thus, by the letter dated 02.05.2023 the petitioner was invited to appear before the Human Resource Committee of the Board on 10.05.2023 at 11.00am. The purpose was to accord the petitioner due process through rehearing of the disciplinary case. The petitioner attended but his case could not be heard due to pressure or heavy agenda and the petitioner was informed accordingly. The Committee had exhausted the quarterly sittings for financial year 2022/2023 for want of budgetary provisions and was unable to immediately sit and re-hear the petitioner’s disciplinary case.
- g. The Committee invited the petitioner to appear on 07.07.2023 immediately at the commencement of financial year 2023/2024. The petitioner attended, was heard and informed that his representations would be deliberated before the full board and a decision communicated.
- h. Shortly after the hearing the respondent’s board was reconstituted again on 13.07.2023 by gazette notice no. 9135 of 2023. The reconstitution of the board complicated the deliberation by the full board of the Committee findings after the disciplinary re-hearing on 07.07.2023.



- i. The respondent urges that it is not true that the petitioner has been condemned unheard or that there is a premeditated decision on the disciplinary case.
 - j. The respondent's case is that its human resource policy and procedures manual prescribes that interdiction be determined within 6 months but it as well does not set timelines for determination of disciplinary cases.
5. Final submissions were filed for the parties including supplementary submissions for the petitioner. The Court has considered the parties' respective cases and the material on record. The Court returns as follows.
6. The 1st issue is whether the petition is premature or barred on account that the petitioner has not exhausted the prescribed procedures under the Public Service Commission Act, 2017. It is submitted for the petitioner that the petition is premature and therefore jurisdiction of the Court is thereby barred. The respondent submits that under section 72 of the Act, where a public officer has been interdicted or suspended, the public officer may, in writing, request the authorised officer to communicate the progress and action taken towards the conclusion of the disciplinary case. The section provides that the authorised officer should reply in 30 days failing the public officer may apply to the Public Service Commission for the lifting of the interdiction or suspension. Upon receipt of the application by the public officer the Commission will make a decision which may include the termination of the disciplinary procedure. It is also submitted for the respondent that under section 74 of the Act, any person dissatisfied or affected by a decision made by an authorised officer or other authority in exercise or purported exercise of disciplinary control against any public officer under the Act may appeal to the Commission, and, the commission may set aside the impugned decision and in which event the public officer shall revert to the previous status held and receive the attendant benefits as though the decision set aside was never made. It is also submitted for the respondent that even if clause 13.21.2 (viii) of the respondent's manual provides thus, " The matter occasioning the interdiction shall be settled within a duration of six(6) months in the event the matter has not been resolved, the interdicted employee resumes duty pending determination of the case", the same is administrative and subject to the cited provisions of the Act.
7. For the respondent it is submitted that even where a disciplinary case is still pending, upon holding in Geoffrey Mworira –Versus- Water Resources Management Authority & 2 Others [2015] eKLR, the Court held that it can intervene in a disciplinary process where an employer is proceeding in a manner that is manifestly unfair, in breach of the Constitution and in contravention of the employer's own disciplinary manual. That in the present case the Court is invited to intervene because the respondent in violation of the petitioner's constitutional rights under Article 41 and 47 interdicted the petitioner of irrational and unreasonable charges, found him guilty of both major and gross misconduct before and without a hearing, and condemned him to an interdiction that was not only not for the stipulated purpose under clause 13.21.1(i) but was also indefinite and in excess of the 6 months mandated by clause 13.21.2(viii) of the respondent's manual, 2019. The Court's intervention is also invoked to save the petitioner from a disciplinary process where the evidence on record illustrates that contrary to Article 27 and 236 of the Constitution, the respondent is discriminating and victimising him for executing lawful and proper instructions issued by its steering committee and further subjecting him to a disciplinary process without due process. It is submitted that in such circumstances, the Court has jurisdiction to intervene.
8. It was further submitted for the petitioner that Public Service Commission is not a sufficient and adequate forum to resolve the instant dispute because it involves interpretation of the Constitution on matters involving employment and labour relations. It is the Court and not the Commission that has



the necessary jurisdiction to interpret the Constitution per Articles 23 and 162 (2) as read with section 12 of the Employment and Labour Relations Court Act. It was submitted that section 74 of the Act does not override a contractual provision as conferred in an employer’s human resource manual which then is duly incorporated in a contract of service per holding of Makau J in Kamau v Kenya Accreditation Service (petition E053 OF 2021) KEELRC 8 (KLR) (30 July 2021) (Judgment) thus,

“61. In view of this Court, the PSC is not sufficient and adequate forum to resolve the instant dispute because it involves interpretation of the Constitution. Under Article 23(1) and 165(5) of the Constitution, this Court and not the PSC has the jurisdiction to interpret the Constitution in respect of matters related to employment and labour relations in Kenya....”

9. The Court has considered the revival submissions and uphold the submissions made for the petitioner. It is that the respondent does not dispute that the instant petition is about interpretation of the Constitution in view of the matters raised for the petitioner. As submitted for the petitioner the jurisdiction to interpret the Constitution in employment and labour relations disputes falls to the Court as of first or primary instance. Second, the Court returns that the use of “may” in sections 72 and 74 of the Act confers a discretion exercisable at the instance of the affected public officer or official. The sections are not imperative or mandatory that the application or appeal be made as envisaged. Thus, in appropriate cases, such as the instant one, the sections are not available. They are not available because the respondent’s manual provision that the interdiction lasts for only 6 months cures the mischief for which section 72 of the Act was enacted, and further, the respondent admits that it has failed or allegedly been unable to make a decision on the petitioner’s disciplinary case so that, there is no decision appealable within the contemplation of section 74 of the Act. The Court finds that the petitioner was entitled to frame his case as one of alleged unconstitutionality and illegality.
10. In Geoffrey Mworira –Versus- Water Resources Management Authority and 2 Others [2015]eKLR the Court held thus, “The principles are clear. The court will very sparingly interfere in the employer’s entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer’s internal process.”
11. In the instant case, the petitioner has established that first, the purported interdiction was in fact a termination or dismissal because the purported letter to show cause stated with no doubt the petitioner had been found culpable of the alleged gross misconduct. Further, if at all the interdiction was proper, after lapsing of the 6 months, the respondent failed to allow the petitioner to resume duty. Accordingly, a predetermined finding as manifested in the letter to show cause was confirmed. In the meantime, the purported disciplinary proceedings were never concluded. In such circumstances, it cannot be said that the mischief for which sections 72 and 74 of the Act were enacted ever accrued in the instant case. The respondent was clearly proceeding unlawfully, unconstitutionally, in breach of the contract of service, and, in a manner that there existed no alternative machinery to remedy the injury but by the instant petition. The Court finds that the test for Court’s intervention as per Geoffrey Mworira –Versus- Water Resources Management Authority and 2 Others [2015]eKLR has been established and the petitioners’ case upheld.
12. To answer the 2nd issue, the Court returns that the petitioner has established the Constitutional violations as already found. While making that finding the Court has considered the respondent’s submission to the effect the disciplinary case against the petitioner is pending. That assertion is found



misconceived and misleading. The Court has found the letter to show cause to have in fact been a finding of culpability and the ensuing further steps belong to pretended disciplinary process. The Court has considered the reasons why the pretended disciplinary process never concluded and returns that the reasons are unjustifiable and incredible. Thus, the alleged unsigned minutes or records of proceedings of the initial hearing have not been exhibited. No good reason is given why the minutes were not signed at all. Similarly, the record of the second hearing or the re-hearing have not been exhibited. The Court has considered the two reasons in the letter to show cause. As for the 1st alleged reason, there is no doubt that the petitioner acted upon the decision of the steering Committee. He has established discrimination and victimization as no action was taken against the committee members and he has shown that he strictly implemented the committees' instructions. As for the 2nd alleged reason, it is established that the claimant has explained he took steps to safeguard the record of the zoom meeting by promptly deleting the record from the zoom cloud storage. Now in the further replying affidavits, the respondent alleges disclosure by the petitioner of the information to a person currently acting in the petitioner's position and more important, in circumstances that such alleged particulars were not part of the details in the letter to show cause. Such fabricated afterthought alleged particulars are clearly not part of what the respondent calls pending disciplinary case. The Court returns that in all circumstances, the predetermined termination conveyed in the purported or pretended letter to show cause are established to have been unfair per tests in section 45 of the *Employment Act*, 2007 because they did not relate to the petitioner's conduct, capacity, compatibility, or the respondent's operational system. The reasons are found not to have been genuine, as they have not been shown to exist as envisaged in section 43 of the *Employment Act*, 2007. The Court returns that the pretended interdiction and the disguised letter to show cause amounted to predetermined termination of the contract of employment. The petitioner has established violation of his constitutional rights and freedoms as already found thus Articles 27 on equality before the law and freedom from discrimination; Article 47 on fair administrative action; Article 50(1) on fair expeditious determination of disputes in accordance with applicable law; Article 236 on protection of public officers from victimization for having performed duty lawfully and from removal from office or punishment except per due process have been established to have been violated together with the cited values and principles of Article 10 of the *Constitution*. The Court finds accordingly.

13. The 3rd issue is on remedies. The Court finds that the petitioner has established justification for grant of the reliefs as prayed for. However, the Court will decline the grant of compensation for violation of the rights in consideration that the other remedies granted will serve adequate ends of justice. In particular, purge of the violations is effectively served by returning the petitioner in a position he would be as though no such violations had taken place. Interest may be payable in terms of final orders and the respondent will pay costs of the petition.

In conclusion, judgment is hereby entered for the petitioner against the respondent for:

1. The declaration hereby issued that the respondent's letter reference no. RE2018/0425 dated 06.12.2022 violates the petitioner's right to fair administrative action under Article 47(1) of the *Constitution* and section 4(3)(b) of the *Fair Administrative Action Act*, 2015 given that it communicated the culpability of the petitioner and indicted him of major and gross misconduct before affording him an opportunity to be heard and make representation.
2. The declaration hereby issued that under clause 13.21.2(viii) of the respondent's human resource policy and procedure manual of 2019 the duration of an interdiction is a period of six (6) months and the national values and principles of rule of law, good governance, transparency and accountability under Article 10 of the *Constitution* enjoin the respondents to not subject an employee to any interdiction beyond the stated 6 months.



3. The declaration hereby issued that by subjecting the petitioner to an interdiction beyond the period of 6 months prescribed under clause 13.21.2(viii) of the respondent's human resource policy and procedure manual of 2019 the respondents have violated the petitioner's right to fair labour practices under Article 41 of the Constitution and further violated the national values and principles of good governance, transparency, accountability and rule of law under Article 10(1) and (2) of the Constitution.
4. The judicial review order of mandamus hereby issued against the respondent compelling the respondent to unconditionally lift the petitioner's interdiction and or suspension as contained in the letter reference no. RE2018/0425 dated 06.12.2022 and reinstate him to his position of Manager, Information Communication and Technology with full salary and benefits with immediate effect.
5. The judicial review order of certiorari hereby issued against the respondent quashing the whole and entire decision contained in the letter reference number RE2018/0425 dated 06.12.2022 on the basis that it violates Articles 10, 27, 29, 41, and 47 of the Constitution and the provisions of the Fair Administrative Action Act, 2015.
6. The judicial review order of prohibition hereby issued to prohibit the respondent permanently from subjecting the petitioner to any disciplinary or adverse administrative action based on the contents of the letter reference no. RE2018/0425 and 06.12.2022 on the basis that it violates Articles 10, 27, 29, 41, and 47 of the Constitution and the provisions of the Fair Administrative Action Act, 2015.
7. The declaration hereby issued that the respondent has discriminated against the petitioner by singling him out as solely responsible for shutting down the respondent's SAP system as particularised in letter reference number RE2018/0425 dated 06.12.2022 and subjecting him to a disciplinary action in breach of Article 27(1) of the Constitution given that the decision in question was in fact made by five members of the respondent's Steering Committee that included its Chief Executive Officer and General Managers against whom no adverse action was initiated.
8. The judicial review order of mandamus hereby issued against the respondent compelling the respondent to release all withheld salary, allowances and benefits owed to the petitioner with immediate effect and paid by 15.08.2024 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
9. The declaration that the delay in the purported disciplinary process and purported interdiction that the respondent has subjected the petitioner to by dint of the letter reference no. RE2018/0425 dated 06.12.2022 is not only inordinate but is also inexcusable and violates the national values and principles of governance of accountability, good governance, transparency, rule of law and integrity under Article 10 of the Constitution and the right to administrative action that is expeditious, efficient, lawful and procedurally fair under Article 47 of the Constitution.
10. An order that the petitioner's costs of the petition be paid by the respondent.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 24TH MAY 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

