



**Tana River County Public Service Board & another v Public Service Commission; Kenya County Governments Workers Union (ON Behalf of Abdireman Huko Dakane & 18 others) (Interested Party) (Petition E011 of 2023) [2024] KEELRC 1374 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1374 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
PETITION E011 OF 2023**

**AK NZEI, J  
JUNE 6, 2024**

**BETWEEN**

**TANA RIVER COUNTY PUBLIC SERVICE BOARD ..... 1<sup>ST</sup> PETITIONER**

**THE COUNTY GOVERNMENT OF TANA RIVER ..... 2<sup>ND</sup> PETITIONER**

**AND**

**PUBLIC SERVICE COMMISSION ..... RESPONDENT**

**AND**

**KENYA COUNTY GOVERNMENTS WORKERS UNION (ON BEHALF OF  
ABDIREMAN HUKO DAKANE & 18 OTHERS) ..... INTERESTED PARTY**

**JUDGMENT**

1. The Petition herein is expressed to be anchored on Articles 3(1), 27(c), 41,48,50,159,165(6), 234 and 258 of *the Constitution* of Kenya 2010. The facts of the case as set out in the Petition dated 2/5/2023 and the affidavit of Victoria Tumaini, the first Petitioner’s CEO, are as follows:-
  - a. that vide a letter dated 1/11/2020, the Interested Party (Kenya County Government Workers Union), acting on behalf of one Abdireman Huko Dakane and 18 others, wrote to the Respondent herein (the Public Service Commission) appealing against the dismissal of some 19 employees by the 2<sup>nd</sup> Petitioner (the County Government of Tana River). In the Interested Party’s view, the dismissal had been politically instigated.
  - b. that on 18/1/2021, the Respondent wrote to the 1<sup>st</sup> Petitioner (Tana River County Public Service Board), asking it to file response to the Interested Party’s appeal and to forward to the Respondent all the relevant documents within its possession, including the record of proceedings, minutes, and decisions made in the matter. That even though the Respondent’s



said letter was dated 18/1/2021, it was not served on the Petitioners until 18/3/2021, more than a month later.

- c. that the Respondent's said letter dated 18/1/2020 and served on the Petitioners on 18/3/2021 did NOT attach a list of the 19 employees alleged to have been dismissed from employment.
- d. that on 18/3/2021, the 1<sup>st</sup> Petitioner wrote to the Respondent requesting to be furnished with a list of the 19 employees to enable the Petitioners to respond to the appeal and to forward to the Respondent all the relevant documents in the Petitioners' possession.
- e. that the Respondent did not avail a list of the 19 employees requested for by the 1<sup>st</sup> Petitioner, but went ahead to allow the Interested Party's appeal, vide its letter dated 13/10/2021, as follows:-
  - i. The Appellants were appointed on various dates between 2014 and 2016, hence their claim that employment was legitimate and that their termination vide letters dated 7<sup>th</sup> March 2018 were politically instigated following an election cycle appears convincing.
  - ii. The Commission had requested the County Public Service Board to file their comments in regard to the Appeal vide letter Ref. PSC/CSP/4(28) dated 18<sup>th</sup> January 2021 and the CPSB had not responded to rebut the Appellant's claim; and
  - iii. Allowed the appeal as no rebuttal had been given to challenge the Appellants claim."
- f. that surprised by the Public Service Commission's decision, the 1<sup>st</sup> Petitioner wrote a letter dated 4/2/2022 protesting against the Commission's failure to furnish the Petitioners with particulars of the 19 employees, and seeking review of its decision.
- g. that the Public Service Commission's (Respondent's) decision had not been made on merit, as the Petitioners had been condemned unheard for no justifiable reason.
- h. that the names of the 19 employees were only brought to the Petitioners' attention through the Respondent's letter dated 13/10/2021 communicating its decision.
- i. that in its decision of 28/3/2023, the Respondent dismissed the Petitioners' application for review, expressing the view that no new material facts had been presented, and that there was no error apparent on the face of the record, stating as follows:-

"The Commission therefore pursuant to Section 88(5) (a) of the *Public Service Commission Act*, 2017 and Regulation 24(8) of the Public Service Commission (County Government Appeal Procedures) Regulations, 2016;

  - c. Disallow the application for review dated 4<sup>th</sup> February 2022;
  - d. upholds its decision communicated via letter dated 13<sup>th</sup> October 2022."
- j. that the Petitioners faulted the Public Service Commission's decision made on 28<sup>th</sup> March 2023 for the following reasons:-
  - i. the Public Service Commission failed to appreciate the fact that failure to furnish the Petitioners with a list of the 19 employees made it extremely hard for the 1<sup>st</sup> Petitioner to mount response to the appeal.



- ii. at the time of making an application for review, on 4<sup>th</sup> February 2022, the Public Service Commission had, vide its letter dated 13<sup>th</sup> October 2021, made known to the Petitioners the 19 employees in the decision of 13<sup>th</sup> October 2021, hence documents relating to the 19 employees in question produced by the Petitioners in the review application amounted to new evidence, thus making the application for review meritorious due to the reasons:-
    - i. that according to Section 88 of the Public Service Act (PSC Act), fresh grounds that may necessitate review include fresh material facts which, on exercise of due diligence, could not be presented when the decision was first made.
    - ii. that the Petitioners have employed hundreds and thousands of employees, many of whom willingly resign, others quit, while others are dismissed for various reasons. That it was practically impossible for the Petitioners to have guessed who the 19 employees were.
    - iii. that it was imperative that the Respondent and the Interested Party specified the 19 employees by giving their particulars in their first letter to the Petitioners. That the Petitioners could not suo moto guess right who the 19 employees were. That (eventual) provision of the 19 employees' particulars amounted to new evidence.
    - iv. that the Respondent fell into error by dismissing the Petitioner's application for review.
  - k. that in the Respondent's decision dated 13<sup>th</sup> October 2021, the Petitioners were condemned unheard, while in the second decision of 18<sup>th</sup> March 2023, the Respondent fell into error and upheld its decision of 13<sup>th</sup> October 2021 whereby the Petitioners had been condemned unheard.
  - l. that the Interested Party wrote to the Petitioners on 6<sup>th</sup> April 2023 asking them to comply with the Respondent's impugned decision, hence the necessity for the Court's intervention.
  - m. that the dispute was never heard on merit.
2. The Petitioners further pleaded that by upholding the decision of 13<sup>th</sup> October 2021, the Respondent fell into error and thereby grossly violated a number of rights and fundamental freedoms guaranteed to the Petitioners, including the right to fair trial guaranteed under Article 25 of *the Constitution* of Kenya, the right to equal protection and equal right to the law provided under Article 27, the right to access to information held either by the state or another person guaranteed under Article 35 and the right to have any dispute that can be resolved by application of the law decided in a fair and public hearing by a Court or if appropriate by another independent and impartial tribunal or body as guaranteed under Article 50 of *the Constitution* of Kenya.
3. The Petitioners sought the following reliefs:-
- a. a declaration that the Respondent's action of not supplying the Petitioners with particulars of the 19 employees despite the Petitioner's requests amounted to violation of the Fair Administrative Actions Act, the *Employment Act* and *the Constitution* of Kenya, and therefore illegal.
  - b. an order of Certiorari be issued removing into this Court and quashing the decisions made by the Public Service Commission dated 13<sup>th</sup> October 2021 and 28<sup>th</sup> March 2023.



- c. a declaration that the decisions made by the Public Service Commission on 13<sup>th</sup> October 2021 and 28<sup>th</sup> March 2023 contravened Articles 25,27,55(1) and 50 of *the Constitution* of Kenya 2010, and thus unconstitutional.
  - d. a mandatory injunction do issue compelling the Respondent to start the hearing of the dispute between the Petitioners and the Interested party de novo.
  - e. any other relief that the Court may deem just to grant.
  - f. that costs of the Petition be borne by the Respondent.
4. Documents annexed to the affidavit sworn in support of the Petition included the Interested Party's letter of Appeal to the Respondent dated 1<sup>st</sup> November 2020, the Respondent's letter to the 1<sup>st</sup> Petitioner dated 18/1/2021, the 1<sup>st</sup> Petitioner's letter to the Respondent dated 18/3/2021, the Respondent's letter dated 13/10/2021 addressed to the 1<sup>st</sup> Petitioner and the Interested Party, the Respondent's decision dated 28/3/2023 and the Interested Party's letter to the 1<sup>st</sup> Petitioner dated 6/4/2023.
5. The Respondent entered appearance and on 18/5/2023 and filed a replying affidavit, sworn by Dr. Simon K. Rotich on 17/5/2023, in response to the Petition. It was deponed in the said replying affidavit, inter-alia:-
- a. that on receiving the Interested Party's appeal dated 1/11/2020, the Respondent forwarded the same to the Petitioners, who did not respond to the same within 14 days as requested.
  - b. that the appeal was processed and was presented before the Respondent's County Appeals Committee pursuant to Regulations 11(4) of the Public Service Commission (County Government Public Service Appeals Procedures) Regulations 2016, and was considered and allowed on 22/9/2021; and that the decision was communicated to the Petitioners vide a letter dated 13/10/2021.
  - c. that on 4/2/2022, the Respondent received a request for review, and that upon considering written representations submitted by the parties pursuant to Regulation 13(3) as directed by the Respondent, the application for review was disallowed, and the Commission's decision communicated vide a letter dated 28/3/2023.
  - d. that the Respondent never received the letter dated 18/3/2021, and that the copy of the said letter exhibited by the Petitioners did not bear a receiving stamp.
  - e. that the matter filed before the Commission was as a result of a ruling of the Honourable Justice Rika delivered on 28/10/2020 in Mombasa ELRC Cause No. 204 of 2019 which the Court had stayed and referred the matter to the Commission, and that the Petitioners had participated; hence they could not allege that the names of the 19 employees were brought to its attention vide the letter dated 13/10/2021 communicating the Commission's decision.
  - f. that pursuant to Regulation 11(7) of the Public Service Commission (County Government Public Service Appeals Procedures) Regulations, 2016:-

“The Committee MAY hold a hearing at which the Appellant and the Respondent shall be examined by the Committee and given an opportunity to make further submissions in relation to the appeal.”



- g. that the foregoing means that the hearing, either orally or through written submissions, is discretionary where the Commission’s Committee feels that the information available is not enough to make a decision.
  - h. that based on Section 88 of the [Public Service Commission Act](#), the Respondent found that the material provided by the Petitioners on review was not new material, but information that they ought to have provided at the appeal stage.
6. The Interested Party filed a Replying Affidavit, sworn by Roba Sharu Duba on 20/6/2023. It is deponed in the said replying affidavit, inter-alia:-
- a. that the Petitioners having failed to respond to the Interested Party’s appeal, the Respondent allowed the same vide a decision dated 13<sup>th</sup> October 2021 and ordered the reinstatement of the 19 employees. That the appeal was heard and determined on merit.
  - b. that the Petitioners were given adequate opportunity to prosecute their review (application) by filing submissions and documents in support of the application.
  - c. that the Respondent disallowed the application for review and communicated its decision to both parties.
  - d. that the Petition is frivolous, vexatious and a non-starter as the Petitioners seek to appeal the Respondent’s decision through the back door, by alleging denial by the Commission of an equal opportunity to be heard.
  - e. that the matter had been referred to the Commission (the Respondent) vide a Ruling of the ELRC (Mombasa) in Cause No. 204 of 2019, in which the Petitioners were represented, and that their allegation that the names of the 19 employees were only brought to their attention on 13<sup>th</sup> October 2021 was neither here nor there.
7. Parties filed written submissions pursuant to the Court’s directions in that regard, which I have considered. The issues for determination, in my view, are as follows:-
- a. whether this court has jurisdiction to hear and to determine the petition herein.
  - b. whether the Petitioners were condemned unheard and if so, whether this amounted to violation of their Constitutional right.
  - c. whether the Respondent’s decisions dated 13/10/2021 and 28/3/2023 respectively should be quashed and reliefs sought in the Petition granted.
8. On the first issue, it is to be noted that as stated by the Supreme Court of Kenya in the case of SAMUEL KAMAU MACHARIA -VS- KCB & ANOTHER [2021] eKLR:-
- “A Court’s jurisdiction flows from either [the Constitution](#) or legislation or both. Thus, a Court of law can only exercise jurisdiction conferred by [the Constitution](#) or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
9. This Court, the Employment and Labour Relations Court is, by dint of Article 162(2) (a) of [the Constitution](#) of Kenya 2010, a Superior Court of equal status with the High Court, specifically established to deal with matters employment and labour relations. The subject matter in the Petition before this Court, and previously before the Respondent which sat as a quasi – Judicial body, is a matter employment between an employer (the Petitioners) and its former employees who are, and have been represented by their Trade Union (the Interested Party).



10. Article 165(6) of *the Constitution* of Kenya 2010 grants the High Court, and therefore this Court, jurisdiction and power/authority to hear and to determine the Petition herein. The sub-Article provides as follows:-

“The High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising Judicial or quasi-Judicial function, but not over a superior Court.”

11. In my view, the foregoing Constitutional provision applies *Mutatis-Mutandis* to this Court regarding matters employment and labour relations, thus, this Court is constitutionally empowered to exercise supervisory jurisdiction over subordinate Courts and over any person, body or authority exercising judicial or quasi-judicial function relating to matters employment and labour relations. In this case, the Respondent falls in the category of bodies and/or authorities exercising a quasi-judicial function on matters employment. Its decisions are subject to scrutiny by this Court when their fairness, legality and constitutionality are challenged before the Court. If the procedure employed and/or adopted by the Respondent in performing its quasi-judicial function is unconstitutional wrong, unprocedural or illegal, it cannot be said that this Court has no jurisdiction to address the grievance arising therefrom (*Mumo-Matemu -vs Trusted Society of Human Rights Alliance & 5 Others*). It is my finding that the Petition herein is not frivolous, and that the same is properly before this Court. This Court has jurisdiction to hear and to determine it.

12. On the second issue, that is whether the Petitioners were condemned unheard, I have taken note of the contents of the Respondent’s letter to the 1<sup>st</sup> Petitioner dated 18/1/2021 and shown to have been received by the 1<sup>st</sup> Petitioner on 10/3/2021. The letter states as follows:-

“Notice To Submit Recommendation And Documents

The Commission is in receipt of a letter dated 1<sup>st</sup> November 2020 from Kenya County Government Workers Union on behalf of nineteen (19) employees from Tana River County Government against dismissal from service (copy attached).

Now This Notice Require You: -

- i. To file a response to the appeal; and
- ii. To forward all relevant documents within your possession including the record of proceedings, minutes and decisions made on the matter.

Take Notice that you are required to respond to this notice within fourteen days from the date of receipt of this notice.”

13. The foregoing letter is not shown to have contained the names and/or particulars of the nineteen (19) employees on whose behalf the Interested Party herein was appealing. I have also noted that the Interested Party’s letter dated 1<sup>st</sup> November 2020 lodging and/or instituting the appeal before the Respondent Commission, and which was attached to the Respondent’s letter to the 1<sup>st</sup> Petitioner dated 18<sup>th</sup> January 2021, did not also contain the names and/or particulars of the nineteen (19) employees of the Petitioners on whose behalf the appeal had been instituted.

14. It ought to be noted that the aforesaid notice/letter dated 18<sup>th</sup> January 2021 was received by the Petitioners almost a month from its date (on 10<sup>th</sup> March 2021).



15. The record herein shows that on 18<sup>th</sup> March 2021, the 1<sup>st</sup> Petitioner wrote to the Respondent requesting for the list of the 19 employees who had appealed to enable the Petitioners to respond to the appeal and to be able to forward all the relevant documents in their possession. The letter is shown to have been copied to the Interested Party. The Petitioners pleaded and deponed herein that their said letter was never responded to, and that the list and particulars of the 19 employees who had appealed to the Public Service Commission (the Respondent) were never furnished to them. That the said list and particulars were only availed to the Petitioners by the Respondent along with the Respondent's decision on the appeal vide a letter dated 13<sup>th</sup> October 2021.
16. The allegation by both the Respondent and the Interested Party that there had previously been Court proceedings on the matter that were subsequently stayed, and that the Petitioners ought to have known the particulars of the 19 employees in issue are neither here nor there, in my view. Appeals to the Public Service Commission pursuant to Section 77 of the County Governments Act are never part of, and/or a continuation of previous Court proceedings; as such appeals are to the Commission, but not to the Courts. Full disclosure by the Respondent of the names of the 19 employees who had appealed and their employment particulars was necessary. The Petitioners pleaded and deponed herein that they employ hundreds and thousands of employees, and that the list and particulars that they sought was necessary if they were to respond to the appeal and to avail to the Respondent all the relevant documents for purposes of the appeal.
17. Further, I have not seen, in the record herein, any indication on whether or not parties to the appeal were at any given time required to attend hearing of the appeal and if so, when and how notices were send out.
18. After the Petitioners mounted an application for review of the Respondent Commission's decision upon getting particulars of the 19 employees from the decision communicated to them on 13<sup>th</sup> October 2021, and after availing to the Respondent all the relevant documents in their possession regarding the 19 dismissed employees, they were not given an opportunity by the Respondent to be heard. The Respondent "considered" the application in the Petitioners' absence and dismissed it.
19. It was deponed on behalf of the Respondent that its handling of the Petitioner's application for review of the Respondent's decision was above reproach by dint of Regulation 7(II) of the Public Service Commission (County Government Public Service Appeals Procedures) Regulations 2016 which provides that:-

"The Committee may hold a hearing at which the Appellant and the Respondent shall be examined by the committee and given an opportunity to make further submissions in relation to the appeal."
20. The Respondent maintained that the foregoing legal provision gave the Respondent the discretion to either hold a hearing or to consider the application without holding a hearing.
21. In my view, the foregoing provision is couched in mandatory terms in view of the words "... hold a hearing at which the Appellant and the Respondent shall be examined by the committee and given an opportunity to make further submissions on the appeal."
22. The right to be heard and the right to a fair hearing are anchored in the need to fulfil one of the basic postulates of the rules of natural justice and the rule of law, that fair and reasonable opportunity of being heard should be given to every person against whom allegations and/or accusations are made. In the instant case, the Petitioners were not able to file response/documents in rebuttal of the allegations/accusations made against them in the appeal because the identity and particulars of their accusers were



not availed to them by the Respondent. This, in my view, amounted to denial of an opportunity to be heard on the appeal. Further, hearing of the appeal proceeded without involvement of the Petitioners, contrary to Regulation 11(4) (c) of the Public Service Commission (County Government Public Service Appeals Procedures) Regulations, 2016 which provides that the committee shall:-

“(c) set down a date when the appellant and the Respondent shall appear before the Committee and be examined in relation to the appeal.”

23. Even though the Petitioners had not filed a formal response to the appeal, the 1<sup>st</sup> Petitioner’s letter dated 18<sup>th</sup> March 2021 requesting for particulars of the employees in issue to enable them to file response to the appeal signified intention by the petitioners to defend the appeal upon particulars being furnished. The Petitioners ought not to have been excluded from the proceedings before the Respondent. Why were the names and particulars of the 19 employees in issue not send to the Petitioners along with the initial notice dated 18<sup>th</sup> January 2021, in the first place.”
24. The right to fair hearing as guaranteed under Article 50 of *the Constitution* of Kenya 2010 includes the right to be informed of the charge/accusation with sufficient detail to enable one to answer to the charge/accusation, and adequate time and facilities to prepare a response and/or defence.
25. Article 35(1) of *the Constitution* of Kenya guarantees the right of access to information either held by the state or held by another person and required for the exercise or protection of any right or fundamental freedom.
26. In being denied the information sought from the Respondent vide the letter dated 18<sup>th</sup> March 2021, which information in any case ought to have accompanied the Respondent’s letter dated 18<sup>th</sup> January 2021, the Petitioners’ Constitutional right to a fair hearing was violated.
27. In view of all the foregoing, it is my finding that the Petitioners were condemned unheard. Any decision flowing from the proceedings conducted before the Respondent, both at the appeal stage and at the review stage, cannot stand.
28. Consequently, the Petition herein is allowed in the following terms:-
  - a. it is hereby declared that the Respondent’s failure to supply the Petitioners with particulars of the 19 employees said to have been dismissed by the Petitioners amounted to a violation of the Fair Administrative Actions Act, the *Employment Act* and *the Constitution* of Kenya, and was therefore illegal.
  - b. an order of Certiorari is hereby issued removing to this Court the decisions of the Public Service Commission (the Respondent) dated 13<sup>th</sup> October 2021 and 28<sup>th</sup> March 2023 respectively for purposes of being quashed, and the said decisions are hereby quashed.
  - c. an order of mandatory injunction is hereby issued compelling the Respodnent to commence a fresh hearing of the Interested Party’s appeal within forty five (45) days of this judgment, and to conduct the same in accordance with the applicable law and procedure.
29. Each party shall bear its own costs of the Petition.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 6<sup>TH</sup> JUNE 2024**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**



This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

.....Petitioner

.....Respondent

