



**Ombati v Governor, Nyamira County & another (Petition
E024 of 2023) [2024] KEELRC 1878 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1878 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E024 OF 2023
CN BAARI, J
JULY 18, 2024**

BETWEEN

DR. TIMOTHY. M. OMBATI PETITIONER

AND

THE GOVERNOR, NYAMIRA COUNTY 1ST RESPONDENT

THE COUNTY GOVERNMENT OF NYAMIRA 2ND RESPONDENT

JUDGMENT

1. Before Court is a petition dated 11th September, 2023, wherein, the Petitioner seeks the following reliefs:
 - i. A declaration that the Respondents have violated the Petitioner's Constitutional Rights as enshrined in Articles 28,41,47 and 50 by the decision to terminate and dismiss him.
 - ii. An order of *certiorari* to issue to bring into this court for the purpose of quashing the decision made vide the communication of the Respondent to the Applicant communicated through the letter dated the 6th September, 2023 terminating his employment.
 - iii. An order of *mandamus* to issue to bring into this court for the purpose of compelling the Respondent to reinstate the Petitioner back into the service on his previous rank and to pay owing dues back to the date of dismissal.
 - iv. An Order for general and aggravated damages as compensation for unlawful, unfair and unprocedural termination of service, the anxiety and emotional suffering occasioned by the Respondents actions to dismiss the Petitioner without following due process & without any reasonable cause.
 - v. In the alternative to prayer (iii) above, an order for compensation for the remainder of his term.



- vi. An Order for interest on prayers (iv).
 - vii) That the costs of this Petition be borne by the Respondent.
 - viii) Any other order that the Honourable Court deems fit and just to grant.
2. The petition is premised on the grounds on the face of the petition and the supporting affidavit sworn by the Petitioner on 11th September, 2024.
 3. On the 27th of February, 2024 parties agreed to canvass the petition by way of written submissions. Submissions were received from both parties.

The Petition

4. The Petitioner states that having been appointed the County Executive Committee Member (CEC) for health Nyamira County, he discharged his duties diligently till he was unceremoniously dismissed.
5. The Petitioner avers that the genesis of his woes was the requisition of drugs worth 22 million for distribution to health facilities. He avows that he informed the 1st Respondent of the expected delivery date being 6th July, 2023, which date the 1st Respondent's pushed to 11th July, 2023.
6. The Petitioner's further case is that on 11th July, 2023, the flagging-off of the drugs to various health facilities proceeded as scheduled even though the supplier had not availed the full consignment. He affirms that non-delivery of the full consignment was occasioned by the supplier not himself.
7. The Petitioner contends that MEDS, the supplier did not notify him of the intended partial delivery. He asserts that the delivery of the full consignment was curtailed by protests in Kisumu organised by the opposition party.
8. The Petitioner's case is that the remaining consignments were later delivered on 16th and 17th July, 2023.
9. The Petitioner avers that this failure to avail the full consignment at the flagging-off ceremony, angered the 1st Respondent resulting in his termination from service.
10. It is the Petitioner's case that his dismissal from the service of the Respondents was devoid of reason and procedural fairness, hence resulting in trampling of his Constitutional rights.

The Respondent's Case

11. The Respondents state that the Petitioner was rightfully dismissed from duty. They aver that having been tasked with procurement of drugs worth Kshs 22,489,617/=, the Petitioner misled and misrepresented to the 1st Respondent that the entire consignment had been received and distributed.
12. The Respondent further states that the fraud and misrepresentation was unearthed after an emergency incident at Ikonge Girls Secondary School exposed a drug shortfall.
13. The Respondents contend that after full inquiry, several anomalies and malpractices attributable to the Petitioner were revealed.
14. It is the Respondents' case that the Petitioner's actions contravened the principles of good governance, integrity, transparency and accountability and reduced confidence in the 1st Respondent's office.
15. The Respondents' further case is that the Petitioner's dismissal was justified and was carried out in accordance with the *Employment Act*.



The Petitioner's Submissions

16. It is the Petitioner's submission that the disciplinary process fell short of the requirements of Article 47 of the Constitution for being procedurally and substantively unfair. He cites the case of Walter Ogal Anuro v Teachers Service Commission (2013) eKLR, where the court held that for a termination of employment to be fair, there must be both substantive justification and procedural fairness.
17. In further buttressing the unfairness of the dismissal, the Petitioner submits that he was denied the opportunity to adduce evidence or call witnesses. He submits further, that he was not informed of any internal appeal mechanisms forming part of the disciplinary process.
18. It is submitted for the Petitioner that 'portraying the governor in bad light before right members of society' could not be a reason for dismissal from service. Furthermore, the Petitioner submits that Section 43 (2) of the Employment Act enjoins an employer to only dismiss for reasons genuinely believed to exist at the time of termination.
19. In support of his case, the Petitioner submits that the Respondents already knew that the supplier was at fault by the time they issued him with a notice to show cause and a letter of termination from service. For this reason, he urges the court to find that the termination of employment was opaque, egregious, capricious, whimsical and antithetical to Articles 10,25,41,47 and 50 (1) of the Constitution of Kenya.
20. In urging the grant of judicial review orders, the Petitioner submits that the 1st and 2nd Respondents are Constitutional offices eligible to checks and balances under the Fair Administrative Actions Act. He cites the Court of Appeal case of Kenya National Examination Council vs Republic Exparte Geoffrey Gatbenji & 9 Others [1997] eKLR on the scope of *certiorari* and *mandamus* orders sought herein.
21. In further urging his case, the Petitioner submits that the lack of a hearing pointed to the dismissal from employment being politically instigated. He emphasises the sacrosanct nature of a hearing by citing the case of Communication Commission of Kenya & Others v Royal Media Services & other [2015] eKLR for the holding that: -

“Article 47 in the circumstances, is a deliberate step towards the attainment of a fair and dependable government advancing expeditious, efficient, lawful reasonable and procedurally fair Public policies. A breach of Article 47 attracts remedies in Judicial review, especially where an aggrieved person had cause to expect that the attendant aspects of fair administrative action would be adhered to. It is clear that the essence of Article 47 is to protect a party's legitimate claim of entitlement that is, procedural solidity and not a mere promise of consideration. As such, the court can quash any decision arrived at unprocedurally or unfairly but reserves itself no right to engage in the administrative duties of the body in question. The court must remain a court.”

22. In staking claim to general and aggravated damages, the Petitioner cites Article 23(3) of the Constitution on the court's power to grant compensation in proceedings for enforcement of Article 22 of the Constitution. He equally submits that the Respondents had greatly embarrassed him by painting him as a corrupt individual. He sought to rely in the case of James Orengo v Attorney General Nairobi HCC No 207 of 2002, where the court rendered itself as follows: -

“...The case law is clear that damages are designed not only to compensate the Plaintiff, but also deter wrongful behaviour. In *Rookes v. Bernard (supra)* the Court elaborated on the use and importance of exemplary damages: “it serves a valuable purpose in restraining the arbitrary and outrageous use of executive power.” The Court emphasizes the use of



exemplary damages in cases such as this one: “There are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording practical justification for admitting into the civil law a principle which ought logically to belong to the criminal The first category is oppressive, arbitrary or unconstitutional action by the servant of the government.... where one man is more powerful it is inevitable that he will try to use his power to gain his ends...servants of the government are servants of the people and the use of their power must always be subordinate to their duty of service....”

23. The Petitioner further cites the case of *Alice Ndaani & 5 others v Mwalimu National Savings and Credit Co-operative Society Limited* [2021] eKLR where the Petitioner was awarded Kshs 100, 000/= as general damages for violation of Constitutional rights to fair labour practices.
24. It is the Petitioner’s assertion that in view of the foregoing, and the fact that his rights under Article 28,41 and 47 of the *Constitution* have been violated, he is entitled to Kshs 2,000,000/= as general and aggravated damages.

The Respondent’s Submissions

25. The Respondents submit that the Petitioner has failed to prove that his termination of employment violated his Constitutional rights. They aver that in case of incompetence or gross misconduct, the Governor is empowered by Section 31 of the *County Government Act* to terminate a County Executive Committee Member.
26. Furthermore, the Respondents submit that a County Executive Committee member serves at the Governor’s pleasure. They cite the Court of Appeal in *County Government of Nyeri & Another v Cecilia Wangechi Ndungu* (2015) eKLR where the court opined: -

“Under Section 31(a) of the *County Government Act*, the Governor has powers to dismiss a member of the County Executive Committee at any time, that is at his pleasure, and that the said power to be exercised reasonably and not arbitrarily or capriciously. Furthermore, that a County Executive Committee Member is deemed as the Governor’s right hand, hence the Governor has to have confidence in him and if that were not the case, then the Governor would have the capability of removing such a member without undue delay so as to enable the County Executive Committee to function for the benefit of the County.”
27. In view of the foregoing, it is the Respondents’ submission that the Petitioner’s dismissal from employment was fair and valid, having been informed by the findings of investigations into his docket and misrepresentation of facts to the 1st Respondent.
28. The Respondents submit that the audit report revealed a number of misgivings in the Petitioner’s docket, among them variances between commodities ordered and the invoices. The Respondents contend that the grounds for the Petitioner’s dismissal from employment met the test of reasonableness set out in the case of *British Leyland UK Ltd v Swift (1981) L.R.L.R.* 91 where Lord Denning stated thus: -

“The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably



dismiss the man the other quite reasonably keeps him on. Both views may be quite reasonable if it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”

29. It is submitted for the Respondents that the Petitioner’s actions portrayed the 1st Respondent as corrupt and elicited public outcry hence justifying his dismissal.
30. The Respondents’ further submission is that the burden of justifying termination was not beyond reasonable doubt. They cite the Court of Appeal case of [Kenya Revenue Authority v Rewel Waitihaka Gitabi & 2 others](#) (2019) eKLR for the holding that: -

“The standard of proof is on a balance of probability, not beyond reasonable doubt and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee’s services. That is a partly subjective test. ”
31. They therefore submit that the termination was necessitated to protect the ideals of devolution. They equally affirm that they exercised their power for public good and not capriciously or whimsically.
32. In respect of the termination procedure, it is the Respondent’s submission that none is required for a County Executive Officer. They cite [Tom Luusa Munyasya & Another vs Governor, Makeni County & Another](#) (2014) eKLR, where the court stated that the appointing authority only needs to give reasons before terminating a state officer.
33. Despite the foregoing, it is the Respondents’ submission that it followed the procedure in Section 41 of the [Employment Act](#) by issuing a notice to show cause dated 2nd August, 2023, which the Petitioner responded to.

Analysis and Determination

34. Having considered the petition, the reply by the Respondents and the submissions by both parties, the following issues present for determination:
 - i. Whether the petition as drawn violates the doctrine of Constitutional avoidance.
 - ii. Whether the Petitioner is entitled to the reliefs sought.Whether the petition violates the doctrine of constitutional avoidance.
35. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis (See [Communications Commission of Kenya & others vs Royal Media Services Limited & 5 others](#) [2014] eKLR).
36. In [Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another](#) [2016] eKLR the Court of Appeal had this to say on the doctrine of avoidance:

“In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly, invoking the constitutional route in the circumstances of this case was misguided. the [Constitution](#) should not be turned into a thoroughfare for resolution of every kind of common grievance.”



37. The Petitioner under the instant petition, argues that his dismissal from the service of the Respondents was devoid of reason and procedural fairness, and which he argues resulted in trampling of his Constitutional rights enshrined in Articles 28, 41, 47 and 50 of the Constitution.
38. In his submissions, the Petitioner prominently challenges the procedure adopted in his dismissal from service, arguing that he was not allowed opportunity to examine witnesses, as well as the reason upon which his dismissal was premised contrary to Section 43 (2) of Employment Act, 2007.
39. It is also not disputed that the relationship between the parties herein, is that of employer and employee, and which relationship arises from a contract of employment.
40. Under the doctrine of constitutional avoidance, this court's jurisdiction sitting as a constitutional court is limited to protecting and enforcing constitutional rights, and not to determine concerns of performance of contractual obligations which can be properly canvassed under civil law.
41. The Petitioner seeks compensation for violation of the rights enshrined under Articles 28, 41, 47 and 50 of the Constitution. These Constitutional provisions said to have been violated, relate to fair labour practices, the right to fair administrative action and the right to be heard amongst others, which are all rights that are protected under the Employment Act, 2007 and the Fair Administrative Actions Act.
42. It is trite law that where legislation has been enacted to give effect to a constitutional right, it is not permissible to base a cause of action directly on the Constitution.
43. The Court of Appeal in Sumayya Athmani Hassan vs Paul Masinde Simidi & another [2019] eKLR, stated;

“The Article 41 rights are enacted in the Employment Act and the Labour Relations Act. The two Acts and the Rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1st Respondent filed a petition directly relying on the provisions of the Constitution for enforcement of contractual rights governed by the Employment Act without seeking a declaration of invalidity of the provisions of the Employment Act or alleging that the remedies provided therein are inadequate.

The petition did not raise any question of the interpretation or application of the Constitution. (emphasis own)

We adopt and uphold the general principle in the persuasive authority in *Barbara De Klerk [supra]* that where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in Communications Commission case [supra].

In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment issue and thus the petition did not disclose a cause of action anchored on the Constitution. Accordingly, the petition being incompetent, the Court acted in excess of jurisdiction and erred in law determining the petition.....”

44. Further in the case of *Re Application by Babadur* [1986] LRC 297, a case from Trinidad & Tobago, the Court held thus: -

“..... the Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim



under substantive law, the proper cause is to bring the claim under that and not under the Constitution.”

45. Additionally, the Western Cape High Court in the South African case of SA Naptosa & Others v Minister of Education Western Cape & others [2001] BLLR 338 at 395 stated:

“...If an employer adopts a labour practice which is thought to be unfair, an aggrieved employee would in the first instance be obliged to seek remedy under the Labour Relations Act. If he or she finds no remedy under the Act, the Act might come under scrutiny for not giving adequate protection to a constitutional right...”

46. For the foregoing reasons, I find the petition wanting, and I am therefore unable to proceed with the determination of the substantive issues raised by the Petitioner, with the result that I proceed to strike out the petition.

47. The petition is hereby struck out with costs to the Respondents.

48. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 18TH DAY OF JULY, 2024.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Waithira h/b for Mr. Omari & Mr. Wambui for the Petitioner

N/A for the Respondents

Ms. Anjeline & Debra- C/As

