



**Tuguro v National Intelligence Service & another (Petition E213 of 2022)  
[2024] KEELRC 2183 (KLR) (6 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2183 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E213 OF 2022  
NJ ABUODHA, J  
SEPTEMBER 6, 2024**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 ARTICLES 10; 19(2); 20(1),  
(2), (3) & (4), 21(1); 27(4); 28; 31 (C) & (D); 41(1) & (2); 47; 50; 165(3); (B); 242(1), (2) & (3).**

**AND**

**IN THE MATTER OF THE NATIONAL INTELLIGENCE SERVICE ACT (NO. 28 OF 2012).**

**AND**

**IN THE MATTER OF UNLAWFUL AND UNFAIR DISMISSAL OF A SENIOR  
INTELLIGENCE OFFICER 1 (NIS LEVEL 8) ON 1ST SEPTEMBER, 2022**

**BETWEEN**

**SAMSON GEKURA TUGURO ..... PETITIONER**

**AND**

**THE NATIONAL INTELLIGENCE SERVICE ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Through a petition dated 5<sup>th</sup> December, 2022, the Petitioner herein alleged inter alia :
  - i. On or about the 3<sup>rd</sup> July 2016, the Petitioner was appointed Intelligence Officer I (NIS Level 6) by the 1<sup>st</sup> Respondent after successfully completing a Senior Intelligence Officer Basic Course at the National Intelligence Academy for Six (6) months and was then promoted to Senior Intelligence Officer II (NIS LEVEL 7) on 3<sup>rd</sup> January 2017 and later promoted to the position of Senior Intelligence officer I (NIS LEVEL 8) on 1<sup>st</sup> July, 2020.
  - ii. In 2017, the Petitioner was posted to Wajir County as the Senior Intelligence Officer in charge of Eldas Sub-County and a member of the Eldas Sub-County Security and Intelligence



Committee where he worked until May, 2018 when he was transferred to Isiolo County as the County Analyst.

- iii. The Petitioner worked in Isiolo County until February, 2022 when he was then transferred to Turkana to work in the same capacity.
- iv. The Petitioner worked so diligently and committedly and never had any disciplinary case or warning and his integrity was exemplary accompanied by high performance in all the years he served the 1<sup>st</sup> Respondent, however, on or about the 25<sup>th</sup> of April, 2022 he was served with a Show-cause letter for Gross Misconduct/Interdiction dated 25<sup>th</sup> April, 2022.
- v. The 1<sup>st</sup> Respondent invited the Petitioner to appear before the Board of Inquiry at the Director Internal Conference Room, NIS Headquarters on the 15<sup>th</sup> of June, 2022 at 11.00 am which the Petitioner attended.
- vi. The Petitioner was further invited to a second meeting with the Board of Inquiry at the NIS Headquarters held on the 21<sup>st</sup> of June, 2022 which the 1<sup>st</sup> Respondent Board invited two witnesses, Eric Bii, Isiolo County Intelligence Coordinator and Ahmed Mohammed who worked with the Petitioner at the E-Citizen Vetting Process in Isiolo. The Petitioner attended to the meeting as required of him.
- vii. Before and during the Inquiry, the Petitioner raised his concerns on the Conduct of the matter by the 1<sup>st</sup> Respondent Board, however, his concerns were dismissed and he was instead warned by the Inquiry Officers that he did not have any right to make demands but to respond to the questions being asked.
- viii. During the meeting Mr. Eric Bii who was the Supervisor at Isiolo County testified that there was no evidence of involvement in any of the stated allegations against the Petitioner, however, the 1<sup>st</sup> Respondent Board denied the Petitioner a chance to cross-examine Eric Bii and refused to show the Petitioner the contents of the confidential letters submitted by Eric Bii they were relying on.
- ix. The 2<sup>nd</sup> witness Ahmed Mohammed testified that there were no complaints against the Petitioner or the Petitioner of their involvement in any malpractice during the vetting process.
- x. The Board Chairman attempted to coerce the Petitioner to change his initial plea of not guilty to guilty and to write a mitigation plea for leniency seeking forgiveness since they had some incriminating evidence that would lead to his dismissal but the Petitioner rejected the approach.
- xi. On or about the 24<sup>th</sup> of July, 2022, the Turkana Intelligence Coordinator (CIC) notified the Petitioner that the Board, Inquiry had found him guilty of all charges and he should await the final decision. However, asked him to urgently submit a mitigation plea to allow leniency final ruling.
- xii. On or about the 23<sup>rd</sup> of August, 2022, the Petitioner was unlawfully and unfairly dismissed from the National Intelligence Service with effect from 1<sup>st</sup> September, 2022 without any lawful cause and/or justification whatsoever.
- xiii. The Petitioner further averred that the 1<sup>st</sup> Respondent;  
  - a. Appointed one Robert Gichura to be the Investigating Officer in to the matter and the Petitioner requested for his disqualification from the Board due to conflict of interest but his request was quashed and Robert was appointed Secretary of the Board.



- b. Some of the 1<sup>st</sup> Respondent Board members used demeaning language and intimidated the Petitioner during the Inquiry proceedings and when the Petitioner requested for audio recording of the proceedings his request was ignored.
  - c. Ignored and or denied the Petitioner’s request to be provided with evidence, witnesses and complaint to the allegations in order for cross-examination: and instead pressured the Petitioner to plead guilty and ask for forgiveness in case he wanted to retain his job.
  - d. Denied the Petitioner access to the records of all individuals that were vetted for passports from Isiolo during his tenure to help disqualify the allegations made against him which violated the provisions of Article 47 and Article 50 of the Constitution of Kenya 2010 and Section 4 of the Fair Administrative Action Act.
2. The Respondent filed a replying affidavit through one Vincent Cheruyiot the Respondent’s Senior Human Resource on 26<sup>th</sup> April, 2023 in which it stated among others:
- a. That from the records held in the NIS Human Resource Department, the Petitioner was appointed to the NIS effective 17<sup>th</sup> January 2017 vide letter dated 17<sup>th</sup> January 2017 and on 20<sup>th</sup> January 2017, the Petitioner accepted the terms and conditions contained in the appointment letter dated 17<sup>th</sup> January 2017.
  - b. That part of the conditions for employment of the Petitioner was to be subject to all rules and regulations for NIS officers as laid down in the NIS Act and as amended from time to time. That Section 16 of the National Intelligence Service Act which governs all NIS officers including the Petitioner before dismissal and Section 23 of the National Intelligence Service Act provide for the issuance of a Disciplinary Code and penalties provided under the disciplinary code in case of a breach.
  - c. That the terms and conditions of service of NIS staff, to which the Petitioner was subject to, provide for dismissal of an officer found to have been in a breach of security and other acts of gross misconduct. That the Petitioner having been assigned the sensitive and critical role of vetting applicants for passport issuance, was engaged in offensive acts of Soliciting and receiving bribes from officers and members of the public thus causing a breach of security, bringing the NIS into serious disrepute and this amounted to gross misconduct.
  - d. That the Petitioner was issued with a notice to show cause on 25<sup>th</sup> April 2022 detailing the acts of gross misconduct he had committed and he was given 14 days to file a response and show cause why disciplinary action should not be taken against him.
  - e. That in view of the grave nature of offence he had committed and in accordance with the 1<sup>st</sup> Respondent’s Disciplinary Rules and Regulations (“DRR”), the Petitioner was interdicted from exercising his duties pending finalization of the case. That the Petitioner submitted a response to the show cause in a letter dated 5<sup>th</sup> May 2022.
  - f. That having been dissatisfied with the response to the show cause, a Board of inquiry was constituted on 3<sup>rd</sup> June 2022 to investigate whether the Petitioner contravened the provisions of the DRR and give the necessary recommendation.
  - g. That the Board issued a notification to the Petitioner informing him that the inquiry will commence on 15<sup>th</sup> June 2022 and he acknowledged receipt of the notice on 8<sup>th</sup> June 2022. That in the notification issued, the Petitioner was given an opportunity to call any witnesses to testify in his defence to the Board and he did not call any witnesses.



- h. That the Petitioner appeared before the Board of Inquiry on 15<sup>th</sup> and 21<sup>st</sup> June 2022 and pleaded not guilty to the charges levelled against him. That during the Board proceedings, the Petitioner was presented with his bank statements for KCB Account Number 111XXXXXX46, Cooperative Bank 01XXXXXXX000 and Equity Account No 01XXXXXXX353 and asked to explain the abnormal increase in the deposits in his accounts in excess of Kshs 3,144,900 between November 2021 and March 2022 linked to a passport vetting syndicate.
- i. That analysis of the evidence revealed numerous links between the Petitioner and passport applicants and brokers including an inducement from one Said 0726\*\*\*\*99, who incidentally got their passport cleared by the Petitioner. That the Board gave the Petitioner an opportunity to examine the evidence, listen to the witnesses, and cross-examine them to ensure a fair hearing.
- j. That the Board noted the Petitioner's general conduct to be rude, arrogant, and dismissive of the inquiry where he often threatened to resign or appeal the verdict in a court of law with the extent of his disdain illustrated by his failure to honor his summons to appear before the Board of Inquiry on 29<sup>th</sup> June 2022.
- k. That the Board having given the Petitioner every opportunity to defend himself in accordance with natural justice rules, recommended that the Petitioner be dismissed. That the Petitioner was given an opportunity to submit a mitigation in accordance with the DRR which he did, dated 24<sup>th</sup> July 2022.
- l. That to ensure the Petitioner receives a fair hearing, a Divisional Disciplinary Committee ("DDC") was constituted in accordance with the DRR to independently evaluate proceedings and recommendation of the Board. That the DDC upon an independent evaluation of the board proceedings its recommendations concurred that the Board accorded the Petitioner a fair trial.
- m. That in a letter dated 23<sup>rd</sup> August 2022 the Petitioner was dismissed from employment with effect from 1<sup>st</sup> September 2022. That the DRR gave the Petitioner an opportunity for further appeal if dissatisfied with the verdict of the DDC to the Service Disciplinary Committee and further to the Director General but the Petitioner did not find it necessary to exhaust these avenues.
- n. That the offences of Soliciting and receiving bribes from officers and members of the public, breach of Security are very serious offences which once committed totally undermine the suitability of any employee continuing in employment.

### **Reliefs sought by the Petitioner**

- i. A declaration that the Petitioner's Fundamental Rights and Freedoms have been violated by the 1<sup>st</sup> Respondent.
- ii. A declaration that the 1<sup>st</sup> Respondent terminated the Petitioner's employment unfairly
- iii. A declaration that the 1<sup>st</sup> Respondent discriminated against the Petitioner
- iv. An Order directed to the 1<sup>st</sup> Respondent to reinstate Petitioner to the position of senior Intelligence officer1(NIS) without loss of any benefits.
- v. Aggravated damages



- vi. General damages for constitutional breaches and violations
- vii. Costs and interests thereon.

### **Petitioner's Submissions**

3. In the submissions in support of the Petition, Mr. Museve for the Petitioner submitted among others that prior to the dismissal the Petitioner never had any warning or disciplinary case against him. The dismissal therefore caught the Petitioner by surprise. Counsel further submitted that upon interdiction the Petitioner only received half his salary and house allowance which he used to settle his Sacco loan and deposited only Kshs 600/- in his Bank Account. This according to counsel was intentional punishment and violated the provisions of Article 4(1) and 28 of the Constitution. Counsel further submitted that the 1<sup>st</sup> Respondent's Board made six allegations against the Petitioner however the Board tried him for only one count which was soliciting and receiving bribes from other officers or members of the public contrary to DRR 2.1. In addition, the Board deviated from the allegations made against the Petitioner in the Notice to Show Cause letter dated 25<sup>th</sup> April, 2022. The Board questioned the Petitioner about his other sources of living and demanded records of his company's transactions which were not relevant to the case made against him by the Board.
4. Concerning discrimination, counsel submitted that the Respondent consistently posted the Petitioner to risky and hardship areas such as Wajir, Isiolo and Turkana areas which were miles away from the Petitioner's home area of Kuria East Migori County. When the Petitioner sought clarification from his supervisor he was advised to report first to his new station to allow the supervisor handle the matter on his behalf but this was never done. This according to the Petitioner violated the provisions of Article 27(4) and 41(1) of the Constitution.
5. Concerning the disciplinary hearing, Mr. Museve submitted that the Petitioner objected to one Mr. Robert Gichura as investigating officer as he was conflicted but the request was not heeded and Gichura was appointed Secretary to the Board. Further the Respondent ignored the Petitioner's request to be provided with evidence, witnesses and complaints and allegations against him but instead was pressured to plead guilty and ask for forgiveness in case he wanted to retain his job. Counsel further submitted that during the 1<sup>st</sup> Respondent's Board Inquiry proceedings, the members of the Board obtained and held print-outs of the Petitioner's cellphone communications, messages and bank statements that were used to ask him questions without sharing the same with him. That according to counsel this amounted to infringement of the Petitioner's privacy contrary to provisions of Article 31(1)(c) & (d) of the Constitution.
6. The Petitioner contended that the termination was substantively unfair because it breached the requirements of fair labour practices and impartial hearing as laid down under article 27 of the Constitution. The Respondent breached the requirements of human dignity as laid down under article 28 of the Constitution, further the Respondent breached the Petitioner's right to privacy as provided for under Article 31 of the Constitution. The termination was substantively unfair because the 1<sup>st</sup> respondent failed to discharge the statutory burden as it invited two witnesses to give evidence at the Board of Inquiry at which one Eric Bii testified that there was no evidence of the Petitioner's involvement in any of the stated allegations made against him. This was further stated by the Respondent's 2<sup>nd</sup> witness Mr. Ahmed Mohammed. This therefore showed that the allegations against the Petitioner were malicious.
7. Mr. Museve further submitted that the termination was procedurally unfair and was contrary to section 45(2), (a), (b) (c) of the Employment Act and section 4 of the Fair Administrative Action Act



because the 1<sup>st</sup> Respondent denied the Petitioner a chance to cross-examine Mr. Eric Bii and refused to show him the contents of the confidential report submitted by him.

8. Counsel requested this court to consider the Authorities in Cause No 147 of 2018, [\*Monica Jepkorir Kipketer v Teachers Service Commission\*](#), Cause No 253 of 2017; [\*Erick Wafula Wetungu v Eastern Produce \(K\) Ltd\(Savani Estate Kamkong\)\*](#) and Petition No 49 of 2020, [\*Chianda v Judicial service Commission & another\*](#).

### **Respondent's Submissions**

9. Mr. Mulili for the Respondent on the other hand submitted while relying on the averments in their replying affidavit filed in this court. On the appropriateness of the Petition, Counsel submitted that the same was premature as the petitioner failed to exhaust internal remedies. The DRR gave the Petitioner an opportunity for further appeal if dissatisfied with the verdict of DDC, to the Service Disciplinary Committee and further to the Director General but the Petitioner did not find it necessary to exhaust the internal appeal process. He instead rushed to court through this petition.
10. That failing to exhaust the appeal mechanism makes the petition premature hence should be struck out. In this respect, Counsel relied on section 9(2) of the [\*Fair Administrative Action Act\*](#) which provides that the High Court or subordinate Court shall not review an administrative action or decision under the Act unless the mechanism including internal mechanism for appeal or review and all remedies available under any other written law are first exhausted. Counsel further relied on the case of [\*Robert Khamala Situma & 8 others v Acting Clerk of the Nairobi City Assembly\*](#) [2022] eKLR.
11. On the issue whether the termination was unlawful, Counsel submitted that the termination was lawful and fair. In this respect Counsel relied on the provisions of sections 41, 43 and 45(2) of the [\*Employment Act\*](#). According to Counsel, section 41 was fully complied with. The Petitioner was served with a show cause letter for gross misconduct dated 25<sup>th</sup> April, 2022 containing clear details of the offences that he was charged with. He was subsequently charged with the offences of engaging in offensive acts of soliciting and receiving bribes from officers and members of the public, breach of security, bringing the service into the disrepute and engaging in gross misconduct. The charges were brought under NIS Disciplinary Rules and Regulations. The Board followed due procedure and found the Petitioner guilty of the charges against him. In this respect Counsel relied on the case of [\*British Leyland UK Ltd v Swift\*](#) [1981]. I.R.L.R 91 per Lord Denning.
12. On the question whether the Petitioner has demonstrated a violation of his rights under the [\*Constitution\*](#), Mr. Mulili submitted that the issues raised in the petition were ordinary employment and labour relations dispute disguised as a constitutional issue contrary to the provisions of article 162(2) and 165(5) of the [\*Constitution\*](#) as read together with section 12 of the [\*Employment and Labour Relations Court Act\*](#). The petition ought to have been presented as an ordinary claim. Counsel further submitted that the [\*National Intelligence Service Act\*](#) under part IV thereof provide for limitation of rights and freedoms of persons who are subject to investigations by the service or suspected to have committed an offence to the extent that subject to section 42, the privacy of a person's communication may be investigated, monitored or otherwise interfered with. The Service shall prior to taking any action under the section obtain a warrant. In the light of the foregoing provision, counsel submitted that the Petitioner's contention that his right to privacy was violated cannot stand.
13. Further on the issue of violation of Constitutional rights, counsel submitted that it was trite law that when someone alleges breach of constitutional right, such person must prove such assertion. It was not sufficient to simply state that a certain Article of the [\*Constitution\*](#) has been breached without stating with proof, exactly how it was breached as the Petitioner has done in this case. In this regard, counsel



relied on the case of *Stephen Nyarangi Onsoma & another v George Magoha & 7 others* [2014] eKLR and *Mumo Matemu v Trusted Society for Human Rights Alliance & 5 others* [2013] eKLR among others.

14. The Respondent raised a fundamental question of vital importance in deciding this petition. This Court on 27<sup>th</sup> October, 2023 stayed the delivery of the judgment in this case and ordered the Petitioner to exhaust the Respondent's internal dispute resolution mechanics by appealing within 30 days. The matter was to be mentioned on 11<sup>th</sup> December, 2023 for further directions. On 8<sup>th</sup> April, 2024 it was confirmed before the court that the Petitioner's appeal to PSC was unsuccessful and it was not clear before the court if the Petitioner had exhausted the right to second appeal. The matter was again mentioned on 27<sup>th</sup> May, 2024 where it was given this judgment date to mean that the internal processes failed.

#### **Determination.**

15. This court has reviewed and considered the Petition, the Respondent's replying affidavit and submissions by both counsels in support and opposition to the Petition; the authorities relied on by counsels and the court has come up with three main issues;
- a. Whether the Petitioner was unfairly terminated
  - b. Whether the Petitioner's Constitutional rights were violated by the 1<sup>st</sup> Respondent and if the Petitioner was discriminated
  - c. Whether the Petitioner is entitled to the reliefs sought.

#### **Whether the Petitioner was unfairly terminated**

16. It is now clear that for termination to pass fairness test there must be both substantive and procedural fairness. I refer to the cases of *Janet Nyandiko v Kenya Commercial Bank Limited* (2017) eKLR and *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR. In the instance case the Respondent has put forth reasons for the summary dismissal of the Petitioner in its dismissal letter dated 23<sup>rd</sup> August, 2022 on six offences set out in its show cause letter dated 25<sup>th</sup> April, 2022. The main offence against the Petitioner was soliciting and receiving bribes from other officers or members of the public contrary to DRR 2.1(xxiv) among others related to this offence. According to the Respondents these offences were grievous in nature and the evidence provided by the investigating board was convincing beyond reasonable doubt.
17. Whereas the Respondent raised those grounds it needed to substantiate the same as required under section 43 of the *Employment Act* that the employer must prove the reasons for termination. The said reasons must be fair and valid and the employer must believe they existed. The employer has a burden under section 47(5) to prove and justify the grounds of termination of an employee.
18. The court notes that from the bank statements provided before it the 1<sup>st</sup> Respondent had a valid reason to dismiss the Petitioner who had excess deposits than what he was earning and some deposits have clearly been linked to the customers he assisted clear their passports. The burden of proof in civil matters is on balance of probabilities and not beyond reasonable doubt. To this extent the court finds that the Petitioner was linked to the offences of soliciting and receiving bribes as shown from the investigation reports.
19. The court notes that the Petitioner's conduct of soliciting and receiving bribes amounted to gross misconduct under section 44(4) of the *Employment Act* and were grounds for summary dismissal. The same were also against the 1<sup>st</sup> Respondent's Disciplinary Rules and Regulations under clause 2.1(xxiv).



20. Concerning procedure for termination, the claimant was issued with notice to show cause detailing the allegations against him and he responded to the same and was subsequently invited for a disciplinary hearing where he was interrogated over the same and at conclusion thereof dismissed.
21. The Court notes that under section 42 of the respondent's Act, part IV thereof provide for limitation of rights and freedoms of persons who are subject to investigations by the service or suspected to have committed an offence to the extent that subject to section 42, the privacy of a person's communication may be investigated, monitored or otherwise interfered with. The Court further notes that the petitioner was working in highly securitised institution, some sort of quasi-disciplined force hence the rigours of civilian processes could in certain situations be strictly observed. To this extent the Court is satisfied that there was reasonable procedural fairness in the hearing process culminating in the petitioner's termination of service.

**Whether the Petitioner's Constitutional rights were violated by the 1<sup>st</sup> Respondent and if the Petitioner was discriminated**

22. The Petitioner has alleged that a number of his Constitutional rights and freedoms were infringed ranging from right to human dignity, privacy, labour relations, equality from discrimination and fair administrative Action. The Petitioner has not stated with precision how the same rights were infringed. An employee of the respondent could be investigated once it was suspected of involvement in any illegal activity. This was provided for in the *NIS Act*. In the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR the Court stated that the Petition ought to be pleaded with precision as required in constitutional Petitions and held as follows:-

It is our finding that the petition before the High Court was not pleaded with precision as required in constitutional petitions. Having reviewed the petition and supporting affidavit, we have concluded that they did not provide adequate particulars of the claims relating to the alleged violations of the *Constitution* of Kenya and the *Ethics and Anti-Corruption Commission Act*, 2011. Accordingly, the petition did not meet the standard enunciated in the Anarita Karimi Njeru case (supra)

23. This leads to the Conclusion that the Petitioner has not established a prima facie constitutional case against the Respondents. The issue of discrimination therefore fails as the Petitioner has not illustrated how being sent to the far counties discriminated against him. In the case of *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021) Discrimination was explained as follows:

“Discrimination was failure to treat all persons equally when no reasonable distinction could be found between those favoured and those not favoured. Not all cases of distinction amounted to discrimination. Discrimination could be said to have occurred where a person was treated differently from other persons who were in similar positions on the basis of one of the prohibited grounds like race, sex disability or due to unfair practice and without any objective and reasonable justification.”

24. Equally, in *Francis Njeru Kariuki v Crown Paints Kenya Limited* [2022] eKLR it was held that:

“According to the Court of Appeal in *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others* [2018] eKLR – “...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions ... whereby persons of one such description are subjected to ... restrictions to which persons of another description



are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description...”

In the instant case, apart from stating that position of Business Development Manager was given to another person, the Claimant provided no factual basis for the allegation. It is the finding of the Court that the Claimant has not on a balance of probabilities established that he was discriminated.”

25. In conclusion, the petition is hereby found without merit and is hereby dismissed with costs.

26. It is so ordered

**DATED AT NAIROBI THIS 6TH DAY OF SEPTEMBER, 2024**

**DELIVERED VIRTUALLY THIS 6TH DAY OF SEPTEMBER, 2024**

**ABUODHA NELSON JORUM**

**JUDGE**

