

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
ELRC PETITION NO. E186 OF 2024

ALEX WATILA.....PETITIONER

VERSUS

**KENYA ACCOUNTANTS AND SECRETARIES
NATIONAL EXAMINATION BOARD (KASNEB).....1ST RESPONDENT**

**PROF. NICHOLAS K. LETTING.....2ND
RESPONDENT**

JUDGMENT

The Petitioner, Alex Watila, filed the petition on 2/12/2024 against the 1st and 2nd Respondents seeking an order in the following terms:

- i) A declaration that the actions of the Respondents in not confirming the Petitioner violates the Petitioner’s right to fair labour practices under Article 41(1) of the Constitution.
- ii) The Petitioner be and is hereby confirmed to employment.
- iii) A declaration that the action of the Respondent orchestrating the illegal disciplinary proceedings and interdicting the Petitioner in total disregard of the 1st Respondent’s Human Resource Manual violates the Petitioners right to fair administrative action and fair hearing under Articles 47(1) and 50(1) of the Constitution respectively.
- iv) A declaration that the actions of the Respondent in perpetually keeping the Petitioner in illegal disciplinary proceedings thereby affecting his mental health and forcing him to undergo disciplinary

- proceedings despite his ill health violates the Petitioner's freedom from cruel, inhuman, degrading treatment and inherent dignity under Articles 25(a) and 28 of the Constitution.
- v) The interdiction be and is hereby lifted
 - vi) Permanent injunction restraining the Respondent's by its servants, agents and nominees from conducting a disciplinary hearing and/or terminating the Petitioner's employment based on the interdiction letter dated 30th October 2023.
 - vii) Compensation for violation of the Petitioner's rights under Articles 25(a), 28, 41(1), 27(1) and 50(1) of the Constitution
 - viii) Costs of the suit.

The issues in dispute as set out by the Petitioner are: -

- (i) Whether failure by the Respondents to confirm the Petitioner to substantive position violates his right to fair labour practices under Article 41(1) of the Constitution.
- (ii) Whether commencement of disciplinary process and interdiction of the Petitioner by a letter dated 30/10/2023 violates the Petitioner's rights protected under Articles 25(a), 28, 41(1) and 50(1) of the Constitution of Kenya and
- (iii) Whether the Petitioner is entitled to the reliefs sought.

Facts by the Petitioner

The Petitioner was employed by the 1st Respondent in the position of Deputy Director, Information Communication Technology by a letter dated 4/1/2023 at Grade KASNEB 3 for a duration of 5 years renewable subject to performance and retirement age. The contract does not have a

probationary clause, however, the petitioner served a six (6) month probation period and was evaluated and recommended for confirmation. To date the recommendation for confirmation has never been implemented.

That the Petitioner while on annual leave was issued with a notice to show cause dated 9/12/2023 setting out seven (7) concerns regarding his work performance. The letter stated that the actions and inactions set out in the letter amounted to inefficiency in work performance which is a major offence under section 11 – Employee Discipline [clause 11.11.1(ii)] of the Human Resource Policy and Procedure Manual (2021). The Petitioner was also accused of negligence under clause 11.11.1(iii). In addition, the Petitioner was accused of violating sections 8, 9 and 10 of Public Officers Ethics Act 2003/ Revised 2016) by virtue of stated poor work performance.

The Petitioner was requested to show cause why action should not be taken against him.

The Petitioner responded to the notice to show cause and by a letter dated 27/5/2024, he was informed that he would be given a hearing on the matter. That this did not happen.

At the end of the year the Petitioner was told to do a self-appraisal which he did but the same was rejected by his immediate supervisor.

The Petitioner requested for mediation in terms of the Respondent's Human Resource Manual and moderation on the issues at hand. The request was not acceded to.

On 14/8/2024, the 1st Respondent through the 2nd Respondent issued the Petitioner with another show cause letter while the first one was never resolved.

The Petitioner instructed his Advocates to issue a letter of demand to the 1st Respondent. The 1st Respondent wrote a letter inviting the Petitioner to a disciplinary hearing without indicating to which show cause letter the hearing related.

The Petitioner was stressed and was diagnosed with depression and severe anxiety as a direct result of the harassment at work. The doctor recommended the Petitioner to take several days off to regain his well-being. The Petitioner indicated he would not attend the disciplinary process in his mental state. The Respondents however interdicted the Petitioner on 30/10/2024, blocked the Petitioner from accessing his electronic mail and instructed the Petitioner to give a comprehensive status on his pending tasks.

That the conduct by the Respondents amounted to unfair labour practice in violation of Article 41(1) of the Constitution.

That the conduct of the Respondents was degrading and inhuman treatment in violation of Articles 25(a) and 28 of the Constitution.

That interdiction without a hearing violated the right of the Petitioner to a hearing in violation of Article 50(1) of the Constitution and same was unfair

administrative process in violation of Article 47(1) of the Constitution. The Petitioner prays to be granted the reliefs sought.

Replying Affidavit

The Respondent replied to the suite vide a replying affidavit of Prof. Nicholas K. Letting the Chief Executive Officer of the 1st Respondent.

The Respondent deposed that several concerns were raised by management in 2023 regarding inefficiency in work performance, negligence of duty and insubordination arising among other allegations against the Petitioner. That subsequently the Petitioner was issued with a notice to show caused dated 19/12/2023 with regard to the same. That the Petitioner responded on 6/1/2024 and denied the allegations against him.

That while the 1st Respondent was evaluating the Petitioner's response on 31/1/2024, a sever outage occurred which resulted in massive loss of critical data for the 1st Respondent's ERP system. That the Petitioner failed to take corrective action and/or report the outage to the organization on time forcing the accounting officer to task a cross-functional team to look into the outage.

That the Petitioner's response was found unsatisfactory and the Petitioner was placed on a performance improvement plan (PIP) on 30/4/2024 in line with 1st Respondent's Human Resource Manual. The action was meant to help the Petitioner improve. The Petitioner was invited to sign the PIP but he declined. The PIP remains unsigned to date.

That upon commencement of PIP, though the Petitioner had been informed that he would be given a hearing on the show cause by a letter dated 27/5/2024, the Board advised that process had been overtaken by events and so the Petitioner did not appear for disciplinary hearing. That the Petitioner refused to comply with instruction to undertake a self-appraisal as guided by his immediate supervisor. That the Petitioner places himself above the supervisor. That the Supervisor had guided the Petitioner what to include in the self-appraisal by an email sent on 16/7/2024 but the Petitioner disregarded the guidelines. That the Petitioner indeed requested for an arbitration following his self-performance appraisal and when he was invited for an advisory meeting on the same with the 1st Respondent's, Deputy Director HRM and immediate supervisor he declined to attend. This process is not provided for in KASNEB HR Manual but the Respondent had acceded to his request.

That while the PIP was subsisting on 9/6/2024 the 1st Respondent suffered another severe outage which led to additional data loss and attempt to recover information was unsuccessful since there was no adequate back up to enhance recovery.

That a circular from the office of the President dated 4/8/2023 had directed all government agencies to onboard all their services to the E-Citizen platform. The Petitioner failed to comply prompting His Excellency the President to cite, the CEO of the 1st Respondent for non-compliance on 28/11/2024. That the CEO reassigned the task to mitigate the non-compliance and 1st Respondent was successfully on boarded to E-Citizen platform.

That the 2nd show cause letter dated 14/8/2024 was necessitated by the 2nd outage, the Petitioner's failure to adhere to the PIP, lack of improvement and additional concerns bordering on willful negligence and improper work performance.

That the Advocate for the Petitioner wrote to the 1st Respondent on 3/9/2024 seeking withdrawal of the show cause letter dated 14/8/2024 but the Advocate did not give any reason why the Petitioner had not responded to the show cause letter. The Petitioner was invited by a letter dated 1/10/2024 for hearing on 9/10/2024 regarding the show cause letter dated 14/8/2024. The Petitioner then pre-maturely came to court and his allegations are only meant to whip the emotions of the court.

That the Respondents deny all allegations of harassment, abuse, violation of the Petitioner's rights under Article, 25(a), 28, 41(1), 47(1) and 50 of the Constitution of Kenya 2010.

That the sudden visit by the Petitioner to a doctor where he obtained 3 days sick off from 8th October 2024 to 10/10/2024, and to return to work on 11/10/2024 was an evasive action to avoid the disciplinary process scheduled on 9/10/2024.

That the Petitioner was issued another hearing notice dated 23/10/2024 to attend on 25/10/2024 considering the term of the Board was due to lapse at the end of October 2024. The Petitioner not only failed to attend the hearing but again presented another sick off sheet dated 26/10/2024 where the doctor recommended 14 days sick off from 26/10/2024 to 8/11/2024.

The Petitioner in a continued scheme to defeat the disciplinary hearing, complained to the Ombudsman without copying the employer. The Office of Ombudsman wrote to the 1st Respondent seeking a response to the Petitioner's complaint by a letter dated 8/11/2024 which is the day this suit was filed in court.

That the Petitioner is on a forum shopping spree to cover his misconduct and to avoid accountability to the employer.

The Board provided adjournments on both occasions, the Petitioner sought adjournment of the disciplinary hearing and the Respondents have no ill will or malice towards the Petitioner.

The Respondents therefore deny all the allegations made against them. That same are false and the petition lack merit. That no employee is immutably immune from vertical and horizontal accountability to their employer.

That the Petitioner has not demonstrated that any of his rights have been violated by the Respondents. That the petition be dismissed accordingly.

Further Affidavit

The Petitioner filed further affidavit denying all allegations made against him by the Respondents. The Petitioner reiterated all averments in the petition and deposition in the supporting affidavit and annexures thereto and joined issue with the Respondents and placed them on strict proof thereof.

DETERMINATION

The court has considered the evidence tendered by the Petitioner in the petition, the supporting and further affidavits vis avis evidence adduced by the Respondents in the replying affidavit. The court has also carefully considered the submissions by the parties including the authorities referred to the court. The issues for determination are:-

- (i) Whether the Petitioner has satisfied the court that the Respondents have violated his rights set out in this petition.
- (ii) Whether the Petitioner is entitled to the relief sought.

The totality of evidence before court has led this court to the inevitable conclusion that the Petitioner was faced with a disciplinary process at the work place which he had persistently made effort to avoid by obtaining sick-offs twice; reporting the matter to the Ombudsman and on the same date filing this suit to obtain injunctive relief.

The narrative by the Petitioner regarding harassment by the Respondents lack credibility on the face of a clear explanation by the Respondents as to why it was necessary to seek the Petitioner firstly to show cause, which he did in writing, followed by a placement on a PIP program which the Petitioner declined to submit to and subsequently being asked to show cause a second time following a second server outage which gravely prejudiced the information and data of the Respondents.

The explanation by the Respondents on the steps taken against the Petitioner is reasonable and the court is of the finding that the steps taken were justified and all the Petitioner needed to do was avail himself of the opportunity given to him to attend a hearing to exonerate himself from the accusation of poor work performance, negligence and insubordination he faced.

In ***Alfred Kimunga versus Bomas of Kenya*** the court stated on a similar request by the Applicant herein

“The Employment Act does not intend that courts take away managerial prerogatives from employers. To give the interim order would have the effect of stifling the management prerogative in staff administration. It would mean the employer does not have more say in the contract of employment it has authored. This would be contrary to the intention of the Employment Act, which seeks to merely protect the weaker of the bargaining partners, not deprive the employer the power to run its business altogether.”

The Petitioner herein did not await the internal process to conclude so as to avail himself of the internal appeal process and a further appeal to the Public Service Commission in line with section 74(1) of the Public Service Commission Act, 2017 which provides that: -

“Any person who is dissatisfied or affected by an appeal’s decision made by an authorized officer or other authority exercise or purported exercise of disciplinary control against

any public officer under this Act may appeal to the Commission.”

It is the court's considered finding that the petition was brought prematurely and the Petitioner avoided the doctrine of exhaustion of internal remedies and the appeal processes, available to all public officers.

The Petitioner also unduly elevated this dispute arising from his contract of employment with the Respondents to a constitutional dispute and thereby violating the doctrine of constitutional avoidance. The Petitioner has in this regard not demonstrated with precision and truth how his fundamental rights and freedoms under the constitution have been violated or are threatened by the lawful due process followed by the Respondents in a bid to get accountability from the Petitioner.

The court is satisfied that the action by the Petitioner to obtain sick-offs whenever he was summoned to attend a disciplinary action was not actuated by truth and good faith but was merely evasive to shield him from his obligations to account to the Respondents.

The court is in this respect guided by the case of ***Mumo Matemu versus Trusted Society of Human Rights Alliance (2013) and Anarita Karimi Njeru (1979) KLR 154.***

It is the courts final finding that the Petitioner has failed to prove that any of his rights were threatened and/or violated by the Respondents on a balance of probabilities.

The Respondents to the contrary, have proved that they had a legitimate reason to subject the Petitioner to lawful disciplinary process in line with the 1st Respondent's Human Resource Manual.

The petition lack merit in its entirety and it is dismissed with no order as to costs since the Petitioner is still an employee of the 1st Respondent and the court encourages parties to adopt a conciliatory approach in matters that are governed by the contract of employment between them and the policy documents that augment their relationship for the mutual benefit of the employee and employer.

Dated at Nairobi this **27th Day of November 2025.**



Mathews Nduma
JUDGE

Appearance:

Mr. Mukele for Petitioner

Ms. Karbolo for Respondent

Mr. Kemboi – Court Assistant

ORIGINAL