



REPUBLIC OF KENYA



KENYA LAW
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**PS Ministry of Defence v Mwaniki & 25 others (Civil Appeal
37 of 2019) [2024] KECA 584 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KECA 584 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 37 OF 2019
SG KAIRU, F TUIYOTT & GWN MACHARIA, JJA
MAY 24, 2024**

BETWEEN

PS MINISTRY OF DEFENCE APPELLANT

AND

SIMON MWANIKI 1ST RESPONDENT
CATHERINE IGOKI MBOGO 2ND RESPONDENT
MARY CORET OLOO 3RD RESPONDENT
BERNARD MWENGESI 4TH RESPONDENT
BRITA DEWA MOLO 5TH RESPONDENT
VERONICA MWAMBOGA 6TH RESPONDENT
JANEROSE KIMATHI 7TH RESPONDENT
HARRISON K. MAINA 8TH RESPONDENT
DOROTH MUKUI 9TH RESPONDENT
PATRICK LUGANDIRU 10TH RESPONDENT
ANTHONY NYAGA 11TH RESPONDENT
FAITH MUGAMBI 12TH RESPONDENT
EVANS MASIGA 13TH RESPONDENT
MACKLINE OSEBE 14TH RESPONDENT
BERNARD LUBIA LUVANDALE 15TH RESPONDENT
GEORGE K. MUNGAI 16TH RESPONDENT
RAPHAEL KILALA 17TH RESPONDENT



JOE OPANA NJURA	18 TH RESPONDENT
CHRISPUS M. MURAGURI	19 TH RESPONDENT
FRANCIS KAMAU	20 TH RESPONDENT
BENSON NYOIKE	21 ST RESPONDENT
GODFREY GICHERU MUCHINA	22 ND RESPONDENT
SLYVIA A. ONYANGO	23 RD RESPONDENT
CAROLINE NJERI	24 TH RESPONDENT
LONAH MUKU GEHEMBA	25 TH RESPONDENT
WAMBUA MUNYASA MATIVO	26 TH RESPONDENT

(Being an appeal against the judgement of the Employment and Labour Relations Court at Nairobi (Wasilwa, J.) dated 18th June 2018 in ELRC Petition No. 97 of 2015)

JUDGMENT

1. This appeal arises from the decision of the Employment and Labour Relations Court (ELRC) dated and delivered on 18th June 2018. The Permanent Secretary (PS), Ministry of Defence (the appellant) is dissatisfied that ELRC found, inter alia, that Simon Mwaniki & 25 others' (the respondents) rights under Articles 41, 47 and 50 were infringed by the appellant; that the 1st to 22nd respondents are entitled to be paid their withheld dues except for the 10th, 20th, 22nd, 24th and 25th respondents who were dismissed; that each of the respondents be paid Kshs. 500,000/= as damages for breach of their constitutional rights; and that costs of the petition be borne by the appellant.
2. A brief background to the appeal is that the respondents filed a petition before the ELRC dated 11th December 2015 which was later amended on 28th December 2016 seeking: a declaration that their rights and fundamental freedoms guaranteed under *the Constitution* and in particular Articles 27, 28, 41, 47, 48 and 50 of *the Constitution* were infringed by the appellant; a declaration that the appellant had no power to subject the respondents to a disciplinary process; the requirement that the 7th and 15th respondents refund the money earned in their previous grade is unconstitutional; the 7th and 15th respondents be entitled to recover their half salary not paid during the interdiction; and the termination of the 22nd respondent be declared as unfair and that he be paid 12 months' salary as damages, one month's salary in lieu of notice and half salary for the period of interdiction.
3. The respondents' case was that they underwent training at the National Industrial Training Institute (NITA) in various fields such as motor vehicle mechanics, carpenters, dress makers, masons, tailors, panel beaters and spray painters, and they were later employed by the appellant in their respective fields of training as Civilian Personnel.
4. It was pleaded that sometime in the year 2013, the appellant instructed all its employees who were employed in the capacity of Civilian Personnel to submit their original certificates issued by NITA for verification. The respondents obliged and subsequently on diverse dates between 19th and 21st November 2013, the appellant informed the respondents that their certificates were allegedly fake.



5. Consequently, on diverse dates between 11th and 13th February 2014, the respondents were issued with termination letters informing them that they have been interdicted and stopped from exercising their duties pending finalization of their respective disciplinary cases. They were then placed on half salary and given 21 days to show cause why they should not be dismissed from employment. They alleged that they appealed against the said decision.
6. It was pleaded that the 7th and 15th respondents were demoted from their previous grades and the appellant sought to recover overpayment of their salaries. The 22nd respondent was terminated from employment on account of applying for employment using an alleged fake certificate.
7. On its part, the appellant, through Dr. Mary Osoro, the Ministry's Human Resource Manager stated that it conducted its own investigations on the authenticity of the certificates being held by the respondents by writing a letter of inquiry to NITA. The Ministry received communication that the respondents held fake certificates and based on that information, it placed the respondents on half salary and issued them with show cause letters asking them to put in their responses within 21 days of receiving the letters.
8. The appellant further stated that it (Ministry) presented the respondents' cases to the Ministerial Human Resource Management Advisory Committee which recommended that the respondents who presented forged certificates for purposes of promotion, be demoted to the appropriate grades and that any accrued overpayment of salaries be recovered, and they be reprimanded. It was further recommended that the respondents who forged documents to secure employment be summarily dismissed.
9. The appellant contended that the respondents were accorded a fair hearing and subjected to fair administrative action. Further, that the respondents did not exhaust all the available avenues, more so that they failed to exercise their right to appeal by writing to the Public Service Commission through its Secretary upon being dissatisfied with its decision before approaching the court.
10. Aggrieved by the decision of the ELRC, the appellant has preferred this appeal which is predicated on the summarised following grounds: that the learned Judge erred in law in finding that the appellant violated the respondents' right to a fair trial under Articles 41, 47 and 50 of *the Constitution* on the basis of lack of an oral hearing; that the learned Judge erred in law in finding that the respondents were subjected to a flawed disciplinary process; that the learned Judge misdirected herself by finding that the respondents were employees of the Armed Forces and hence not subject to the *Employment Act*; and that the Judge erred in law and in fact by finding that the provisions of the Human Resource Manual of the Public Service Commission was flawed and did not measure to what *the Constitution* envisages on fair administrative process.
11. We are accordingly being asked to set aside the decision of the ELRC (Wasilwa, J.) dated 18th June 2015; issue a permanent injunction against execution of the said judgement and decree; grant such other orders as this Court may deem necessary; and award costs of this appeal and in the High Court.
12. The appeal was canvassed by way of written submissions. The appellant's submissions are dated 2nd August 2022 while those of the respondents are dated 16th June 2022. Mr. Musyoka, learned counsel held brief for Ms. Shigolli for the appellant. The respondents' counsel did not attend court for the hearing but we have had the benefit of reading the submissions filed on behalf of the respondents which we shall highlight hereafter.
13. Mr. Musyoka submitted that there was a committee known as the Ministerial Human Resource Management Advisory Committee which issued a notice to show cause to the respondents; that the



- appellant, in conducting disciplinary proceedings against the respondents adhered to the Public Service Commission Manual, 2016 which is drafted in line with Articles 47 and 50 of *the Constitution*; and that pursuant thereto, the respondents were accorded a fair hearing in presenting their respective cases, including the right to legal representation and to appeal. To the counsel, the appellant adhered to fair administrative action process as provided for in the Public Service Commission Manual of 2016.
14. Counsel took issue with the finding of the learned Judge to the effect that the respondents were not accorded fair administrative disciplinary process because oral hearing was not conducted. To the counsel, the mere fact that oral hearing was not done does not, of itself, imply that the respondents' rights under Articles 41, 47 and 50 of *the Constitution* were violated. In this regard, reliance was placed on this Court's case of Kenya Port Authority vs. Fadhil Juma Kisuuswa (2017) eKLR where it was held that 'a hearing' does not necessarily entail oral hearing. It was urged that oral hearing is ordinarily necessary where there are contested facts which require significant explanation or mitigation, which did not obtain in the instant case.
 15. It was further contended that the respondents did not exhaust all the remedies available to them before seeking redress in court. In particular, that none of the respondents appealed against the decision of the Public Service Commission which ought to have been their first port of call. Emphasising this fact, counsel stated that even after the respondents' training certificates were retained and they were given two weeks to appeal, none of them took advantage of this window; and that therefore, the appellant cannot be blamed for the inaction of the respondents.
 16. It was submitted that the respondents were civilians and not members of the Armed Forces, and thus, they were not subject to the *Employment Act*. Counsel premised the submission on the basis that Section 5 of the *Kenya Defence Forces Act*, then Cap 199 (now *Kenya Defence Forces Act*, 2012) applies to civilians as well; that furthermore, the respondents were recruited by the Public Service Commission to perform constitutional duties with the appellant; and that, as such, the learned Judge erred in finding that the respondents were members of the Armed Forces.
 17. In conclusion, counsel urged us to take note of the fact the respondents' sole grievance is that they were not accorded oral hearing before the appellant took the decision he did, and not that the Public Service Commission took a wrong decision or that they (the respondents) possessed fake training certificates.
 18. On behalf of the respondents, it was submitted that they sufficiently demonstrated that their rights under Articles 41, 47 and 50 of *the Constitution* were infringed; that they were subjected to a flawed disciplinary process; and that they were not given a chance to defend themselves against the allegations levelled against them which led to their termination. They also took issue with the fact that they were not furnished with relevant materials that were the basis for their termination so as to enable them to defend themselves as mandated by Articles 41 and 47 of *the Constitution*. They relied on the case of Parliamentary Service Commission vs. Christine Mwambua (2018) eKLR for the proposition that Article 47 (1) of *the Constitution* was breached.
 19. We were accordingly urged to uphold the decision of the trial court which found that the process of the respondents' terminating was unprocedural and unfair.
 20. We have considered the record of appeal, the respective parties' submissions and the applicable legal principles. This being a first appeal, our primary role is to re-evaluate, re-assess and re-analyse the evidence before the trial court and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See Kenya Ports Authority vs. Kuston (Kenya) Limited (2009) 2 EA 212.



21. We have condensed the issues arising for determination to be: whether the respondents were accorded a fair hearing prior to termination of their employment as envisaged by Articles 41, 47 and 50 of the Constitution; and whether they are entitled to their unpaid half salaries during the period they were on interdiction.
22. It is common ground that the respondents at one time were employed by the appellant in various capacities as Civilian Personnel. It is also not disputed that the appellant carried out an audit of the academic qualifications held by the respondents through the institution which offered the courses, that is NITA and it was found that their certificates were fake. It is conceded by the respondents that their certificates were retained by the appellant and they were given 21 days within which to appeal against that decision.
23. The whole process culminated with the interdiction of the respondents through letters dated 11th February 2014 and 19th February 2014. In the said letters, the respondents were given 21 days to challenge the appellant's contemplated actions.
24. Article 47 (1) and (2) of the Constitution as read with section 4 of the Fair Administrative Action Act, guarantee every person who is likely to face and be adversely affected by an administrative action, a fair hearing. Similarly, section 41 of the Employment Act provides that before termination of employment, an employer is expected to explain succinctly the reasons for the termination and give the employee an opportunity to mount his or her defence.
25. Taking to mind the above, the respondents were duly notified in the first instance of the intention to investigate the authenticity of their certificates. The end result of the process was that they were issued with letters of interdiction on diverse dates.
26. We have considered the letters which were sent to the respondents informing them of their interdiction. They were duly notified that the reasons upon which they were being interdicted was that they had submitted fake certificates in order to get employment or promotion. The letters gave them leeway to file their respective responses to the allegations levelled against them within 21 days. The court record does not bear evidence that the respondents filed the responses.
27. In fact, the learned Judge in this respect rendered herself thus:

“The Petitioners were however given an opportunity to appeal to the Public Service Commission within 6 weeks of being informed of the decision by the committee but they did not, the Petitioners aver that they actually appealed and are awaiting for the decision of the Public Service Commission to date. This contention has however not been proved by the Petitions (sic) as they never attached any documents as proof that they appealed to the Public Service Commission...”
28. Section 43 of the Employment Act provides that:
 1. In any claim arising out of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 2. The reason or reasons for termination of a contract are the matters that the employers at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.



29. From the excerpt of the judgment replicated above, it is clear that the respondents were duly informed of the reasons that led to their ultimate dismissal. And, since they chose not to pursue the appeal avenue against the contemplated decision of the appellant, the 10th, 20th, 22nd, 24th and 25th respondents who were dismissed through letters dated 9th September 2015, 10th February 2016 and 21st July 2016 respectively cannot be heard to say that the procedure leading up to the termination of their employment was unfair. They chose to sleep on their rights. Certainly, just as equity does not come to the aid of an indolent, we find that the complaint by the respondents that they were not treated fairly and their rights under Articles 41, 47 and 50 of *the Constitution* had been infringed cannot arise.
30. Having found that the respondents did not exercise their right to be heard, the only logical conclusion was to dismiss the respondents' claim without making any further orders regarding damages which flow therefrom. With tremendous respect to the learned Judge, there was no basis for making an award of Kshs. 500,000/= to each of the respondents as damages for breach of their constitutional rights while in fact there were no rights which had been breached.
31. It is our view that the procedure which the appellant adopted was above board. Having failed to contradict the alleged fake letters, the 1st-9th, 11th-19th, 21st, 23rd and 26th respondents' interdiction and the 10th, 20th, 22nd, 24th and 25th respondents' termination were proper.
32. We now turn to the second issue which is whether the 1st-9th, 11th-19th, 21st, 23rd and 26th respondents are entitled to the unpaid half salaries during the period of interdiction. It is at this stage that we wish to mention that the impugned judgment makes reference to an amended petition, and in particular a paragraph 14C thereof. We have thoroughly combed the record of appeal and it does not contain the referenced amended petition. We shall therefore make reference to the said paragraph 14C in so far as it informed the learned Judge to make her decision.
33. The learned Judge held that these respondents whose interdiction was lifted through letters dated between 23rd March 2015 and 12th May 2015 were entitled to payment of their withheld salaries. As indicated in the impugned judgment, under paragraph 14C of the amended petition, the respondents outlined the salaries due to them during the period of the interdiction. The appellant in its response, did not object that the interdicted respondents were entitled to payment of their withheld half salaries or that the Ministry made payment of the withheld salaries. Indeed, it is not one of the grounds of appeal against the decision of the learned Judge directing payment of the withheld salaries for those respondents who were interdicted. Notably, we do not have a cross-appeal before us by the 1st-9th, 11th-19th, 21st, 23rd and 26th respondents asking for payment of their withheld half salaries during the interdiction period. In the circumstances, we cannot make a finding on the alleged withheld half salaries.
34. As we come to the end of our discourse, we must address the finding of the trial court that the respondents were employees of the Armed Forces, and that therefore, they were not subject to the *Employment Act*. Sections 4 and 5 of the Kenya Defence Force Act provide for the persons whom the Act applies to. They state as follows:
4. This Act applies to the following persons—
 - a. every member of the regular forces;
 - b. an officer or service member of the reserve force, whether of the regular or volunteer reserve who is called out for service or is in training;
 - c. auxiliary reserve force;



- d. any person who, though not otherwise subject to this Act, is serving with the Defence Forces under an engagement, and has agreed to be subject to this Act;
 - e. cadets;
 - f. an alleged spy of the enemy;
 - g. a person who, though not otherwise subject to this Act, is in civil custody or in service custody in respect of any service offence committed or suspected to have been committed by the person;
 - h. a person who, pursuant to a treaty or agreement between Kenya and the State in whose armed forces the person is serving, is attached or seconded as an officer or non-commissioned member to the Defence Forces, subject to such exceptions, adaptations and modifications as may be prescribed by regulations;
 - i. a person, not otherwise a member of the Defence Forces, who accompanies any unit or other element of the Defence Forces that is on active service in any place; or
 - j. a person attending a Defence Forces institution of the Defence Forces established under this Act or any other written law, subject to such exceptions, adaptations and modifications as may be prescribed by regulations.
- 5.(1) The application of this Act to a civilian shall be limited to a person, other than a member of the Defence Forces, whom-
- a. with the authority of an authorized officer, accompanies a part, unit or formation of the Defence Force that is-
 - i. outside Kenya; or
 - ii. on operations against the enemy; and
 - b. has consented, in writing, to subject himself or herself to this Act while so accompanying that part of the Defence Forces.
2. The Defence Council shall, by regulations, prescribe the form and manner in which the consent under subsection (1)(b) may be obtained.
3. For the purposes of this Act and subject to any limitations prescribed by the Defence Council, a person accompanies a unit or other element of the Defence Forces that is on service or active service if that person—
- a. participates with that unit or other element in the carrying out of any of its movements, manoeuvres, duties in aid of a State organ, duties in a disaster or warlike operations;
 - b. is accommodated or provided with rations at the person's own expense or otherwise by that unit or other element in any country or at any place designated by the Defence Council;
 - c. is a dependant outside Kenya of an officer or non-commissioned member serving beyond Kenya with that unit or other element; or
 - d. is embarked on a vessel or aircraft of that unit or other element.



35. Our reading and understanding of section 5 in particular is that the civilians being referred to therein are those who in a nutshell accompany the Defence Forces in an active service. Certainly, the respondents were working with the appellant but not within the Kenyan Armed Forces. Therefore, the KDF Act was not applicable to them at any one point, more so noting that they were recruited to work with the appellant by the Public Service Commission. In no uncertain terms then, we conclude that the respondents were subject to the *Employment Act*.
36. Accordingly, the appeal succeeds. We set aside, in its entirety, the judgment of the Employment and Labour Relations Court delivered on 18th June 2018 declaring that the respondents' rights under Articles 41, 47 and 50 were infringed and that each respondent be paid Kshs. 500,000/= as damages for breach of their constitutional rights.
37. Each party will bear its own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MAY 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

F. W. NGENYE - MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

