



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: OUKO, (P), OKWENGU & SICHALE, J.J.A)**

**CIVIL APPEAL NO. 20 OF 2017**

**BETWEEN**

**MUSA OGARO OSORO.....APPELLANT**

**AND**

**WILFRED N. GUTWA (DIRECTOR OF HUMAN RESOURCE).....1<sup>ST</sup> RESPONDENT**

**KISII COUNTY ASSEMBLY.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY PUBLIC SERVICE BOARD-KISI COUNTY.....3<sup>RD</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF KISII.....4<sup>TH</sup> RESPONDENT**

**(An appeal from the Judgment and Decree of the Employment and Labour Relations Court**

**at Kisumu (Maureen Onyango, J) delivered on the 15th day of September, 2016**

**in KISUMU ELRC Petition No. 24 of 2015)**

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**JUDGMENT OF THE COURT**

[1] Litigation leading to this appeal was commenced by the appellant **Musa Ogaro Osoro**, through a constitutional petition that he filed in the Employment and Labour Relations Court (ELRC) at Kisumu on 19th October 2015. The appellant was employed by the County Government of Kisii (**4<sup>th</sup> respondent**), on 30th April 2014 following an interview carried out by the County Public Service Board Kisii County (**3<sup>rd</sup> Respondent**). On 1st October 2015, by a letter signed by Wilfred Gutwa the Director Human Resources (**1<sup>st</sup> respondent**), the appellant was suspended from duty following allegations made against him by Wakenya Pamoja Sacco Limited.

[2] In his constitutional petition, the appellant sought various orders including:

(i) a declaration that the actions of 1st respondent, and the Kisii County Assembly (2nd respondent) in purporting to send him on unpaid indefinite suspension from duty via the letter dated 1st October 2015, was illegal, invalid, null and void;

(ii) a declaration that the 1st and 2nd respondents lacked the capacity or competence to unilaterally usurp the powers of the County Service Board, by suspending him from duty through their letter dated 1st October 2015 and 2nd October 2015;

(iii) a permanent injunction restraining the respondents either by themselves, agents, servants or employees from interfering or preventing the appellant from performing or executing his duties as an Accounting Officer 1 in the County Government of Kisii, subject only to observance of the provisions of the County Government Act, 2012, the Employment Act and the Constitution of Kenya;

(iv) an order quashing the decision/letter of suspension dated 1st October 2015 and directing the respondents to immediately allow the appellant to resume his duty as accounting officer;

(v) a declaration that the respondents' conduct amounts to unfair labour practices and administrative action and is thus unlawful and unconstitutional.

[3] Hearing of the petition in the ELRC proceeded by way of written submissions which were duly filed by both parties. The respondents who did not file any response to the petition, maintained in their submissions that the action taken against the appellant was in accordance with the County Human Resource Manual, and that the appellant's action was filed prematurely as his suspension was lifted and he was reinstated after he had responded to the allegations made against him.

[4] In the judgment subject of the appeal, the learned Judge dismissed the appellant's petition holding that it was incompetent for failure to state with particularity the provisions of the Constitution that were violated or threatened with violation, and that the Petition was premature and an abuse of the court process.

[5] The appellant has filed a memorandum of appeal in which he has raised seven (7) grounds. In short, the appellant faults the learned Judge for holding that the appellant did not state with particularity the provisions of the Constitution that were violated or threatened with violation, when the same could be ascertained from the petition and the documents that were filed by the appellant; that the learned Judge was prejudiced and dismissed his petition on a technicality contrary to Article 159 of the Constitution; and that the learned Judge set a higher threshold than that set by Chapter 6 of the Constitution.

[6] In support of his appeal, the appellant filed written submissions in which he maintained that he had given adequate particulars of how his rights were infringed, and that in any case, the same could be gleaned from his petition and other documents. The appellant cited several authorities including Elisabeth Kurer Heier & anor vs County Government of Kilifi & 4 others [2020] eKLR in which the Court stated:

***“There is also the proposition under the retired Constitution as set out in Anarita Karimi Njeru vs the Republic [1976-1980] KLR which remains a necessary requirement that where a person is alleging a contravention or a threat of a contravention of a constitutional right, he or she must set out the specific right infringed and the particulars of such infringement or threat.***

***In Trusted Society of Human Rights Alliance vs Attorney General & 2 others [2012] eKLR, this Court stated;***

***‘... the proper test under the new constitution is whether a petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged’***

***The Court went on to state that:***

***The test is a substantive one and inquires whether the complaints against the respondents in a constitutional petition are fashioned in a way that gives proper notice to the respondents about the nature of the claims being made so that they can adequately prepare their case.”***

[7] In a second appeal such as this one the Court has an obligation to consider and reanalyze the evidence which was before the trial court with a view to arriving at its own conclusion. (See Kenya Ports Authority vs Kuston (Kenya) Limited [2009] 2 EA 212). In this matter, the trial court determined the matter by way of submissions, and therefore this Court is in the same position as the trial court to the extent that there was no oral evidence and the facts are not substantially in dispute. Having considered the record of appeal and the submissions made by the appellant, we find that the main issue is whether the appellant properly pleaded the alleged issues of violation or threatened violation of his constitutional rights, and if so, whether the appellant established his claims regarding the alleged violations.

[8] In Mumo Matemu vs Trusted Society Alliance & 5 others [2013] eKLR, this Court affirming the principle in Anarita Karimi Njeru stated *inter alia* as follows:

***“The principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the courts know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru that established the rules that requires reasonable precision in framing of issues in constitutional petition is an extension of this principle.”***

[9] We reiterate that clear, concise and precise pleadings are necessary in a constitutional petition, in order to determine the constitutional violations. A look at the appellant's constitutional petition that was filed in the ELRC, shows that the appellant in his 25 paragraph petition made several allegations. In particular, at paragraph 21 of the petition the appellant claimed that the respondents' conduct was arbitrary, whimsical and capricious, and at paragraph 22, that the honorable court has the jurisdiction to address the appellant's grievances and enforce the violation of his rights under Article 22(1), 23(1) and 23(2) of the Constitution of Kenya.

[10] Article 22 of the Constitution gives every person the right to institute court proceedings where a right or fundamental freedoms in the Bill of Rights has been violated or is threatened with violation, and Article 23 gives the Court authority to uphold and enforce the Bill of Rights. It was therefore pertinent that the appellant relying on these provisions, identifies the right or fundamental freedom in the Bill of Rights that had been violated or threatened with violation. However, the appellant's petition talks generally of alleged violations and does not mention any Article, or specify any of the rights or fundamental freedoms in the Bill of Rights that had been infringed or threatened with violation.

[11] Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice Rules, 2013 (The Rules) under which the appellant's petition was brought, requires that a petition should disclose *inter alia*:

**“(b) the facts relied upon;**

**(c) the constitutional provision violated;**

**(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community.”**

[12] These requirements are reinforced by Form A in the Schedule to the Rules, which gives the format of the petition and states that:

**“The allegations upon which the Petitioner(s) rely must be concisely set out, in consecutively numbered paragraphs and should address the following: (a) the facts of the case, (b) nature of the injury caused or likely to be caused to Petitioner or public in public interest suits,…”**

[13] The appellant's petition does not pass muster as it has not set out the nature of the injuries or the specific constitutional provisions violated, but has relied on general statements regarding the respondents' conduct. Without stating with particularity in the petition the nature of the injuries suffered, the appellant's petition could not stand. The finding of the learned Judge that the appellant failed to state with particularity the provisions of the Constitution that were violated, cannot be faulted.

[14] We note that in the affidavit sworn in support of the appellant's petition, the appellant has alleged violation of Article 47 of the Constitution on Fair Administrative Action, Article 41 that deals with Right to Fair Labour Practices and Article 50 that deals with Right to Fair Hearing. The purported violations having been hinged on the appellant's suspension from employment, there was need to plead with specific particularity in the petition how the constitutional provisions were violated or threatened with violation.

[15] Moreover, it is evident that the appellant was aggrieved by the disciplinary process to which he was subjected. Under section 59 of the County Government Act, the County Public Service Board had the mandate to exercise disciplinary control over the appellant as an employee of the County Government of Kisii, and section 86(1) of the County Government Act gives the County Service Board powers to delegate such functions.

[16] The letter of suspension stated in part as follows:

**“It has been reported to this office that your general conduct as an accountant is wanting and contravenes Chapter Six of the Constitution of Kenya on Public Officer Conducts and so the following allegations have been reported against you.**

**1. As a former employee of Wakenya Pamoja Sacco your services were terminated on grounds that you had stolen Kshs. 300,000 and absconded duty which is a criminal offence.**

**2. You also have an outstanding loan balance with Wakenya Pamoja Sacco of Kshs. 901,497.94 which despite various demand notices to pay, you have not bothered to do so.**

**In view of the above, it is contemplated to take severe disciplinary action against you which may include dismissal from the service. However, before this is done you are hereby called upon to show cause why disciplinary action should not be taken against you. Your response if any should reach this office within fourteen (14) days from the date of this letter.**

**In the meantime…”**

[17] It is clear from the above letter that the appellant was given reasons for the respondents' action and given an opportunity to respond to the allegations made against him. The contention that the appellant did not receive fair administrative action was therefore not supported by the evidence that was before the learned Judge. As regards the alleged violation of right to fair labour practices, fair labour practices is a broad concept and without any specific particulars, there was nothing upon which the appellant's complaint could be anchored. In addition, the appellant was subjected to a disciplinary process that is provided for under the County Government Act, and under which there are clear safeguards to ensure fairness and adherence to the Constitution as well as an appellate process to the Public Service Commission. It is not therefore correct that the process was contrary to the fair labour practices. As regards the right to fair hearing under Article 50 of the Constitution we reiterate that the respondents had just initiated the disciplinary process and the appellant was informed of the reasons for the action taken against him and given opportunity to respond to the allegations. We do not therefore find any violation or threatened violation of the alleged constitutional provisions.

[18] For these reasons, we find no substance, in the appellant's appeal as the process that he was subjected to, was fair and in accordance with the process provided, the respondents reviewed his suspension and reinstated him back to work. The appeal lacks merit and is accordingly dismissed. As the respondents did not file any submission or attend Court, we do not find it appropriate to award any costs.

**Dated and delivered at Nairobi this 5<sup>th</sup> day of March, 2021.**

**W. OUKO (P)**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**