



Mutongu v St Paul's University (Employment and Labour Relations Petition E081 of 2023) [2024] KEELRC 181 (KLR) (8 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 181 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E081 OF 2023
MN NDUMA, J
FEBRUARY 8, 2024**

BETWEEN

REV DR ZABLON BUNDI MUTONGU PETITIONER

AND

ST PAUL'S UNIVERSITY RESPONDENT

RULING

1. The respondent noted a preliminary objection to the petition dated 5/1/2023 to wit:

“1. That the petitioner’s claim herein violates the doctrine of constitutional avoidance.”

Parties have filed written submission in respect of the preliminary objection which the court, has carefully considered together with the pleadings by the petitioner.

The cause of action is aptly set out in the petition as follows:-

“That the petitioner was employed by the respondent University as a Lecturer on 1st of August, 2005 and confirmed on October, 29th 2007, and served the respondent university in various capacity all throughout his 18 years of employment up until his termination from employment on the 6th of April 2023 as the respondent’s Deputy Vice Chancellor Finance and Administration.”



2. The petitioner outlined the procedure followed by the respondent before terminating his employment and at paragraph 15 concludes:

“That the conduct of the respondent is a violation of the petitioner’s constitutional rights and concept of fairness and justice as enshrined in Article 41 and 47 of the Constitution and section 4 of the Fair Administrative Actions Act.”

3. The petitioner then seeks the following reliefs:-

1. That a declaration that the petitioner’s fundamental rights and freedoms have been violated by the respondent.
 2. That a declaration that the respondent summarily dismissed the petitioner’s employment unfairly.
 3. That a declaration that the respondent discriminated against the petitioner.
 4. That an order directed to the respondent to reinstate the petitioner to his position of Deputy Vice Chancellor, Finance and Administration be issued.
 5. Aggravated damages.
 6. General damages for Constitutional breaches and violations.
 7. Costs of, and incidentals to, the proceedings be borne by the respondent.
 8. Any other relief that this Honourable Court may deem just to grant.
4. It is important to note that the respondent is a private institution and not a public one. The employment relationship between the claimant and the respondent is governed by the contract of appointment appended to the petition, going up through the ranks until the petitioner was ultimately appointed to the position of Deputy Vice Chancellor (Finance and Administration) by a letter dated 26/11/2019 which letter sets out the terms and conditions of service between the petitioner and the respondent.
5. The letter contains a termination clause stating the manner in which the employment contract of the petitioner may be terminated.
6. Strictly speaking, the relationship between the petitioner and the respondent is governed by the said letter of appointment, as modified and or regulated by the Employment Act, 2007.
7. The termination clause in particular is to be read in light of the relevant provisions of the Employment Act, including sections 36, 41, 43, 44, 45, 46 and 47 of the Employment Act, 2007.
8. Remedies applicable upon termination of the contract are as set out under section 49 of the Employment Act, 2007, and any other applicable law.
9. Article 41 of the Constitution was enacted to elevate the relationship between an employee and the employer on matters set out under that Article to constitutional rights protected by the bill of Rights in the Constitution and are protected under Article 22 and 23 of the Constitution which gave any person whose rights have been threatened or violated the right to bring a petition before the High Court and this court, where the right involved arises out of an employee and employer relationship and may be better protected and or vindicated under the constitutional provisions as opposed to by way of a mundane claim brought to court in terms of the Employment Act 2007 as read with the Employment



and Labour Relations Court Act, 2014 and the Employment and Labour Relations Court (Procedure) Rules, 2016, by way of a memorandum of claim.

10. As a general principle, not every dispute between an employee and employer warrants the filing of a Constitutional petition. The petition must on the face of it disclose circumstances that preclude the petitioner from bringing a normal claim and take the que que like all other litigants waiting for their day in court, having followed the law and rules of procedure of the court.
11. Article 47, in particular relates to fair administrative action in public domain rather than in respect of private, contractual relationships between an employee and an employer in the private sector. The rights of the parties are protected and vindicated by the contract of employment and the procedure set out in the Human Resource Policy documents of the employer which are expressly or by implication made part of the contract of employment. The statutory law and in particular, the Employment Act augments the policy documents. The rules of natural justice as articulated in the decisions of the courts overtime, enrich the jurisprudence in the resolution of employment matters.
12. An employee ought not therefore to easily avoid all the above, and resort to what many litigants regard as a quick fix aimed at jumping the que que since ordinary claims take longer to hear and determine before this court, as opposed to petitions which are largely concluded on papers without having to call any witnesses. The perceived quick fix has its blunt side however, as it hardly adequately addresses the matters and remedies that are ordinarily and in my view more efficiently addressed in a normal claim and upon a full hearing of the matter on the merits.
13. In the matter of Communication Commission of Kenya & 5 others versus Royal Media Services Ltd & 5 others [2014] eKLR the Supreme Court addressed this matter as follows:-

(256)

" The appellants in this case are seeking to invoke the "Principle of avoidance" also known as "Constitutional avoidance." The Principle of avoidance entails that a court will not determine a Constitutional issue, when a matter may properly be decided on another basis. In *South Africa in S. V. Mbulungu* 1995 (3) 807 – CCC the Constitutional Court, Kenfridge A. J articulated the principle of avoidance in his minority judgement as follows [at paragraph 59]"

" I would lay it down as a general principle where it is possible to decide any case civil or criminal without reaching a constitutional issue, that is the cause which should be followed

(257) similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it if there was also some other basis upon which the case could have been disposed of (*Ashwander V. Terrence Valley Authority*, 297 U. S. 288, 347 (1936).

(259) from the foundation of Principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents claim in the High Court regarding infringement of intellectual property right was a plain copy right infringement claim and it was not properly laid before the court as a constitutional issue. That was therefore not a proper question falling to the jurisdiction of the Appellate court."

14. This court is equally persuaded that the dispute before court is a pure termination of employment dispute between an employee and his employer that is amendable to be fully and properly determined in terms of the contract of employment and the provisions of the Employment Act, 2007 without resort



being had to the provisions of the Kenyan Constitution, 2010. Indeed, given that the petitioner has not specifically laid any statutory basis upon which he impugns the termination of his employment, he is left much the poorer and most probably to his detriment.

15. Having said that, I do not regard the particular objection as a pure point of law that the court may determine without regard to the facts of the case upon consideration of all pleadings, including the response to the petition. Accordingly, the court will leave this matter for determination in the final judgment of the court.
16. Application dated 28th April 2023, was granted *ex parte* by Hon. Manani J. in terms of prayer 2, by issuing an order of injunction restraining the respondent from advertising and or making a substantive appointment to the position of Deputy Vice Chancellor, Finance and Administration pending the hearing and determination of the application.
17. Upon hearing the application inter-parties, the petitioner/applicant prays the court to confirm the said injunction pending the hearing and determination of the petition.
18. The application is based on grounds (a) to (d) set out on the face of the Notice of Motion and buttressed in the supporting affidavit of the applicant the gist of which is that the applicant has been in the employment of the respondent in various capacities for a period of 18 years and had risen to the position of Deputy Vice Chancellor, Finance and Administration. That by a letter dated 6th April 2023, the respondent terminated the employment of the applicant unlawfully and contrary to his right to fair labour practices.
19. That the applicant seeks to be reinstated to the position he held hence the need to preserve the position pending the hearing and determination of the petition.
20. The application is opposed vide the replying affidavit of Jared Ogutu, a member of the respondent's University Council who has detailed the circumstances under which the applicant was summarily dismissed by the respondent from the position of Deputy Vice Chancellor, Finance and Administration on 6th April 2023.
21. The deponent has set out the procedure followed before the action was taken and in particular the Council relied on an internal audit report for the period 31/3/2022 and a report of the Risk Management and Audit Committee dated 28/11/2022 which had disclosed a questionable payment of Kshs. 402, 696 to one Elizabeth Wanjiku Ndubi.
22. The respondent state that following the due process as set out in the institution, they had found the applicant culpable for overriding the respondent's internal financial control measures in ways set out in the said affidavit.
23. That applicant was given opportunity to defend himself in writing and was later subjected to a disciplinary hearing on 21/2/2023.
24. That allegation shall be tested against the evidence presented by the applicant upon hearing of the petition on the merits. The court does not wish to pre-empt the issues at this preliminary stage.
25. The court has been guided by the well laid principle in the case of *Gielle V. Casman Brown and Co. Ltd* [1973] EA 358 and elaborated in *Mrao* that

For the interim injunction to be granted the applicant must:-

- a. establish a *prima facie* case with a probability of success.



- b. that unless he is granted a temporary injunction, he may otherwise suffer irreparable injury which would not be adequately compensated by an award of damages and lastly
 - c. If the court is in doubt, then it will decide the matter on a balance of convenience.
26. Considering all the circumstances of the petition set out herein before, the court is not satisfied that the applicant shall suffer irreparable injury which would not be adequately compensated by an award of damages, should the petition succeed upon hearing on merit.
27. Accordingly, the application lacks merit and is dismissed with costs in the cause.

MATHEWS N. NDUMA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF FEBRUARY, 2024

Appearances

Ms. Guserwa for petitioner/applicant

Mr. Kinuthia for respondent

Ekale: Court Assistant

