



**Cherop v Kenya Marine & Fisheries Research Institute (Petition
E009 of 2022) [2024] KEELRC 1417 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1417 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION E009 OF 2022**

**M MBARÚ, J
MARCH 20, 2024**

BETWEEN

JAMIN SAMMY CHEROP PETITIONER

AND

KENYA MARINE & FISHERIES RESEARCH INSTITUTE RESPONDENT

JUDGMENT

1. The petitioner is seeking various declaratory orders in this petition. The petitioner is seeking orders that termination of employment be found to be unfair and the following orders be issued;
 - a) An order for payment of compensation to the petitioner on account of violation and breach of his constitutional rights;
 - b) An order for payment of compensation to the petitioner in terms of all the lawful dues and benefits with effect from 20 August 2018;
 - c) An order for payment of compensation to the petitioner in terms of general damages;
 - d) An order for payment of compensation to the petitioner in terms of interests compounded yearly with effect from 20 August 2019 until payment in full;
 - e) Payment of costs of this petition.

Petition

2. The petitioner is a male adult. The respondent is established under the provisions of the Science Technology and Innovation Act, 2013.



3. In the year 1981, the petitioner was employed by the respondent as a clerical officer. In October 2016 he was confirmed to the position of Supply Chain Management Officer II. The petitioner worked in this position until 3 October 2019, earning Kshs. 41,590 per month.
 4. On 20 August 2018, the petitioner was suspended from duty on the grounds that the management team had conducted an impromptu inspection of stores to confirm the exact number of paints procured and delivered on 24 June 2018 before making payment to the suppliers. During the inspection, the respondent discovered 9 twenty litres of paint valued at Kshs. 99,500 missing from the stores. The missing paints were bought from a different provider.
 5. The petition is also that the petitioner is alleged to have confessed to the allegations made against him on 14 August 2018. He was then sent on an indefinite suspension.
 6. The petitioner remained on suspension from 20 August 2018 to 3 October 2019 when his employment was terminated over alleged gross misconduct. The petitioner was not charged with any criminal offence as the main reason for the alleged gross misconduct was not proved. There was no charge sheet for fraud over alleged theft. The respondent conducted investigations and prosecuted its case instead of an independent external investigative agency contrary to Section 4.6 of the Discipline Manual for Public Service. Termination of employment was before the conclusion of internal disciplinary processes during the pendency of the appeal by the petitioner to the Public Service Commission (PSC).
 7. The petitioner's case is that he had not made any error that could be capable of construction as the cause of termination of his employment. There was no warning, hearing of the allegations, no evidence was submitted or an opportunity given to allow him to defend himself. The petitioner was never formally charged on account of the allegations made or a show cause notice issued before his dismissal from employment. Such denied him a fair hearing resulting in a violation of his rights under the constitution and the law.
 8. The petition is that the termination of employment was malicious, wrongful, and unfair. The reasons cited for termination of employment were not justified and the petitioner was not allowed to defend himself. The petitioner made an effort to engage the respondent with a view to reconciliation but the respondent refused to address or pay terminal dues.
 9. The petition is that termination of employment is selective and discriminatory. The co-accused were not in a similar manner as the petitioner. The refusal to pay terminal dues was selective against how the co-accused were treated. This violated the constitution.
- The Supporting Affidavit of the petitioner supports the petition.
10. The petitioner testified in court that he served the respondent diligently from the year 1981 but his employment was unfairly terminated on 3 October 2019. He had a clean record over the years. He was not charged in court over any allegations or called for a hearing internally to have his case addressed.
 11. The petitioner testified that on 20 August 2018, he was suspended from duty without a hearing. The suspension notice was not in accordance with the PSC regulations for civil servants which required him to be placed on half salary while on suspension. The respondent alleged that he had fraud and misappropriation in the procurement process. However, he was not called for a disciplinary hearing to defend himself.
 12. The notice was issued after 6 months contrary to the regulations. The petitioner appeared before the disciplinary committee of the respondent but no letter of outcome was issued. The board should have issued a resolution but failed to do so.



13. The petitioner testified that on the allegations that there was missing paint, he was the supply chain and procurement officer and there was no missing paint as alleged. He did not buy any paint to replace any missing paint as alleged by the respondent. He was in charge of procurement and secretary to the evaluation committee to ensure that everything ordered and supplied was correct.
14. The PSC regulates civil servants with the role to investigate and address any misconduct. section 4.0 of the respondent's Discipline Manual concerning cases of fraud allowed the respondent to conduct investigations and then hand them over to the relevant authority for disciplinary action. In this case, the PSC should have been allowed to address the matter.
15. Under Section 44 of the *Employment Act*, 2007 (the Act), the question of summary dismissal is allowed but the respondent failed to communicate the outcome of the disciplinary hearing concerning the alleged missing paint.
16. The main challenge to the disciplinary process is that the petitioner was called for the hearing after 6 months contrary to the human resources manual and *PSC Act*. Section 79(2) *PSC Act* required the respondent to place the matter with the PSC before his due date for retirement. This was to be preceded by a notice to show cause within 21 days before the disciplinary hearing which was not issued.
17. In the category where the petitioner was placed, his case should have been heard by PSC and not the respondent's disciplinary committee. Where an officer was facing criminal charges before retirement, such matter was to be placed aside for the respondent to conclude the retirement procedures first. The petitioner was not served with any notice of retirement contrary to the *PSC Act*. The respondent did not lose any money and there were no investigations conducted to support the allegations made. The alleged fraud was not reported to the police for investigation. From all the employees involved, the petitioner was indiscriminately selected and dismissed from his employment resulting in a violation of his constitutional rights and the orders sought should be issued.

There is no response to the petition.

18. The respondent filed a Notice of Preliminary Objections on 28 June 2022. These objections were not addressed. They related to objections;

... on a point of law on the ground that this suit is incurably defective as the same is time barred in contravention of Section 90 of the *Employment Act* No.11 of 2007.
19. At the close of the hearing, both parties agreed to file written submissions. None are on record.

Determination

20. Without a response to the petitioner or any work records filed by the respondent, the court is denied important data and records to address the petition. Save for the Notice of Preliminary Objections, the respondent failed to offer anything else.
21. The issues for determination are whether there are constitutional violations; whether there was unfair termination of employment and whether the remedies sought should be issued.
22. The petition is that on 20 August 2018, the respondent suspended the petitioner from duty following impromptu inspections of his department which established that a total of 9 twenty litres cans of paint valued at Kshs. 99,500 were missing. The petitioner was required to show cause why disciplinary action should not be taken against him before 9 September 2018.
23. The petitioner responded to the show cause and suspension through his letter dated 5 September 2018.



24. On 4 February 2019, the respondent invited the petitioner to appear before the investigations committee investigating missing paints at Shimoni Construction. He was required to attend on 6 February 2019.
25. The petitioner has filed a detailed report of the matter dated 18 February 2019.
26. Through a letter dated 24 July 2019, the respondent informed the petitioner that based on his detailed response, his case was under review by the Board of Management and would be informed of the outcome once there was a conclusion of the deliberations.
27. Through notice dated 3 October 2019, the respondent summary dismissed the petitioner on the grounds of gross misconduct for dishonesty and theft by public servants. In the procurement of paints for KMFRI Shimoni construction, a total of 9 paints valued at Kshs. 99,500 went missing. In the notice, the respondent acknowledged that the petitioner had been invited during investigations through a letter dated 4 February 2019, and through a notice dated 18 February 2019 he was invited to attend before a disciplinary hearing and to show cause why he should not be dismissed for the gross misconduct. The decision of the respondent was placed before the Board of Management for a Resolution which was communicated to the petitioner through a letter dated 19 February 2019.

In this background, the petitioner filed this petition.

28. The cause of action arose with the termination of employment on 3 October 2019.
The petition was filed on 27 May 2022.
29. Within the meaning of Section 90 of the Act, a party should move the court with an employment claim within 3 years from the date the cause of action arose. In the case of *Michira & 41 others v Aegis Kenya Ltd t/a Leopard Beach Hotel* (Cause E088 of 2023) [2023] eKLR the court held that the cause of action arises with the end of employment. The last day the employee exits the shop floor, any claim(s) therefrom must be addressed within 3 years, and any continuing injury must be addressed within 12 months. See *Johnson Kazungu v Kenya Marine & Fisheries Research Institute* [2021] eKLR.
30. From 3 October 2019 to 27 May 2022 when the petitioner was filed, three (3) contemplated under Section 90 of *the Act* had not lapsed. The petition is properly filed.

However, is this a proper petition?

31. A petition filed before this court must meet the threshold now outlined in various case laws. Unless the petitioner is challenging the application of a statute as being unconstitutional or requiring a review or repeal, a party should avoid the invocation of a constitutional petition. Under Rule 7(3) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* a party is allowed to lodge a claim and assert his constitutional rights as held in as held in *Jane Angila Obando v Teachers Service Commission & 2 others* [2020] eKLR. Unless a provision of a statute is challenged as being unconstitutional or a party requires the interpretation of the *constitution*, such a party should avoid invoking the constitutional route as held in *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR that;

The Article 41 rights are enacted in the *Employment Act* and *Labour Relations Act*. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1st respondent filed a petition directly relying on the provisions of the *constitution* for enforcement of contractual rights governed by the *Employment Act* without seeking a declaration of invalidity of the provisions of the *Employment Act* or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of the *constitution*.



32. Although the petitioner has cited various constitutional violations and given particulars, there is no matter addressed within the threshold now addressed by the court or the Court of Appeal as requiring him to move his claim under the constitutional petition. A Memorandum of Claim ought to have been filed.
33. Concerning the issues in dispute, Sections 41 and 44 of *the Act* allow an employer to issue notice to the employee over any matter of misconduct or gross misconduct respectively. The employee once is notified of the case he faces and required to respond, such an opportunity should be applied to clear himself. This is the primary and most effective forum for the employee to exonerate himself.
34. In the case of *Mutwol v Moi University* (Civil Appeal 118 of 2019) [2022] eKLR the court held that where the employee is called to show cause why employment should not be terminated, such a procedure is allowed and lawful for the employer to engage the employee. To address any misconduct or gross misconduct, the employer has the prerogative to suspend, send on leave, or have the employee out of the shop floor pending investigations. It is not necessary that there must be a provision in the contract of employment providing for compulsory leave or suspension before an employee can be sent on such leave pending investigations.
35. The assertion by the petitioner that at his level the matter ought to have been placed with PSC for investigations or disciplinary hearing does not remove the primary mandate from the employer to address misconduct or gross misconduct within the shop floor. This is a legal requirement under *the Act*.
36. The petitioner was taken through the motions of a disciplinary hearing on the shop floor. The matter was placed before the Board of Management for a resolution. The petitioner was informed of these procedures through a letter dated 18 February 2019 a day after the disciplinary hearing.
37. The respondent communicated the decision culminating in the disciplinary hearing.
38. The contention that the *PSC Act* did not provide for disciplinary hearings and procedures where the petitioner was pending retirement is to ignore the motions of *the Act*. The petitioner was facing a serious matter of alleged gross misconduct which the respondent addressed with a conclusion. Such matter cannot be replaced with another procedure of retirement to insulate the petitioner.
39. The petitioner was aware of ongoing investigations with regard to the procurement of paints for KMFRI Shimoni construction, he participated in various meetings and consultations over the matter and was allowed to file his written responses. The motions of Section 41 of *the Act* were adhered to. He was found culpable in accordance with Section 43 of *the Act* which requires that where the employer genuinely believes that a ground for terminating an employee has arisen, such is sufficient justification for termination of employment as held in the case of *Matsesho v Newton* (Cause 9 of 2019) [2022] eKLR.
40. in the case of *Terry Muringo Muchiri v K-Rep Group Limited* [2021] eKLR the court held that;

... where the employer genuinely finds a good cause to terminate employment for gross misconduct and the motions of sections 44 and 41 of the Act are adhered to, such termination of employment is justified.

In the case of *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] eKLR the court of Appeal held that;

Under Section 43 of *the Act*, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is,



however, a partly subjective one in that all an employer is required to prove are the reasons that he “genuinely believed to exist,” causing him to terminate the employee’s services. In the present case, it seems quite clear from the evidence on record that KPLC believed, and had ample and reasonable basis for so believing, that Wasike had attempted to steal cable wire from KPLC stores which he was in charge of. ...

41. Despite the respondent not filing any response herein, on the record and evidence before the court, the petitioner was taken through due process and a decision was issued finding him to be of gross misconduct. He was allowed a hearing during the disciplinary hearing and cannot justify a claim that his rights under the constitution or the law were violated. He cannot seek to urge his case under the PSC Act or the regulations thereof as the respondent as the employer had the legal duty to address misconduct and gross misconduct.

42. The claim for payment of compensation on account of violation of the constitution and the law is not available.

43. The claim for compensation for lawful dues and benefits from 20 August 2018 is on the grounds that the petitioner was suspended without pay or benefits and directed to report on duty once a week and not to leave his duty station without leave of the respondent. He would be entitled to a full house allowance and medical allowance. The notice dated 20 August 2018 attached on page 15 of the bundle to the memorandum of Claim filed on 27 May 2022 is not complete. A page or so is not attached to complete the entirety of the suspension notice.

However, the petitioner attached his payment statements;

44. On 31 July 2019, his basic pay was paid at Kshs. 41,590 together with house and medical allowances and salary arrears;

45. On 31 July 2018 a basic wage of Kshs. 41,590 with house and medical allowances and commuter allowances was paid;

46. On 30 November 2018 and 30 September 2018, the petitioner was paid house and medical allowances only.

47. Employment terminated following notice dated 3 October 2019. The cause of action forming the proceedings herein accrued.

48. The wages and benefits due from 20 August 2018 until 3 October 2019 are payable less than what the petitioner has since received in-house, medical, and other benefits. The petitioner shall attend at the shop floor for assessment of his wages due and not paid over this period in accordance with Section 18(4) of the Act that directs the employer to;

(4) Where an employee is summarily dismissed for lawful cause, the employee shall, on dismissal be paid all moneys, allowances, and benefits due to him up to the date of his dismissal.

49. The claim for payment of interests on the dues owing to the petitioner only accrues for good cause and where the respondent fails to pay the same upon demand or the order of the court. In the letter of demand dated 31 July 2019, the disciplinary hearing had not concluded. The award herein clarified, that such shall be paid upon the petitioner undertaking clearance and tabulation of what is due in unpaid salaries and benefits, if any.



50. Accordingly, save for the award of payment of any lawful dues and benefits with effect from 20 August 2018 to 3 October 2019; other claims fail. The petitioner shall attend for clearance and tabulation of dues unpaid, if any within the next 14 days. Each party bears its costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 20 DAY OF MARCH 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

