



Ochuodho v Kenya Chemical Workers Union & 2 others (Employment and Labour Relations Petition E131 of 2023) [2024] KEELRC 750 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 750 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E131 OF 2023**

**MN NDUMA, J
MARCH 20, 2024**

BETWEEN

HENRY OKELLO OCHUODHO PETITIONER

AND

KENYA CHEMICAL WORKERS UNION 1ST RESPONDENT

**NATIONAL CHAIRMAN OF KENYA CHEMICAL WORKERS
UNION 2ND RESPONDENT**

**NATIONAL GENERAL SECRETARY OF THE KENYA CHEMICAL WORKERS
UNION 3RD RESPONDENT**

JUDGMENT

Facts of the petition

1. The petitioner was elected to the office of the National Treasurer of the 1st respondent in the election held on 15th May 2021. That the position attracted remuneration set out in the petition. The petitioner is also the elected Branch Secretary of the 1st respondent.
2. That on 4/5/2022, the National Council of the 1st respondent suspended the petitioner from his union duties on allegation of misappropriation of the 1st respondent's finances in a report of the Audit Finance Committee pending further investigation.
3. That the petitioner earned a consolidated and consistent salary of Kshs. 93,000/= on account of being both the sanctioned full time secretary and the National Treasurer.
4. That from May, 2022, the petitioner was placed on half salary in the sum of Kshs. 46,500/= while awaiting a hearing before the central council. That the council met on 6/4/2023 but did not address the issue.



5. That the petitioner has been kept in limbo to-date and has not been formally removed from office.
6. That the petitioner was not provided with any written reasons why the Executive Board suspended him from office since only the central council had power to do so.
7. The petitioner has through his advocates demanded reinstatement to his office and or be allowed hearing by the central council.
8. That the said suspension is unlawful and unfair and the petition be allowed and the petitioner be granted the reliefs sought as follows:-
 - a. Compensation on withheld salary and allowances as Branch Secretary of the Nairobi Branch and National Treasurer of the 1st respondent.
 - i. Half salary of Kshs. 46,500/= per month withheld for 10 months from May 2022 to February 2023 = Kshs. 46,500 x 10 months = Kshs. 465,000/=
 - ii. Full salary of Kshs. 93,000/= per month withheld for 4 months from March 2023 to June 2023 = Kshs. 93,000/= x 4 months = Kshs. 372,000/=
 - iii. Compensation of full salary of Kshs. 93,000/= per month withheld every month from the date hereof until the date of judgment, and or restoration of the payment of the salary in full, whichever is earlier.
 - b. General damages for violating and continuing to violate the petitioner's fundamental rights and freedoms under the Constitution of Kenya.
 - c. General damages for suffering and mental anguish and fears for his well-being as one who requires dialysis among other treatment, and has also been unable to fend for self and family while unable to get any other job.
 - d. Punitive damages for negligently and or deliberately depriving the petitioner of his salary and allowances knowing or while they ought to have known of the petitioner's history of kidney ailment necessitating the attendance to hospital twice a week for dialysis, and other health complications that the petition has had, and that he would be unable to fend for self and family or get any other job being infirm and a retiree.
 - e. Exemplary damages for refusal to grant the petitioner a fair hearing and an opportunity to defend himself, clear his name and have rectified public record that is held against his person and conduct as National Treasurer.
 - f. Further punitive damages for lowering the esteem of the petitioner in the eyes of the members of the public and the union by branding him of questionable character while denying him a fair hearing and an opportunity to defend and or exonerate himself from the allegations of financial impropriety and incompetence as a National Treasurer.

Respondent's case

9. The respondents filed a replying affidavit of Jacob Odundo, the Deputy National General Secretary of the 1st respondent who deposes that the petitioner was procedurally suspended and thereafter procedurally removed from the office of the National Treasurer of the 1st respondent which office is very different from the position of office that the petitioner currently holds of the Branch secretary of the 1st respondent.



10. That the office of National Treasurer is an elective office in respect of which the holder is paid an allowance and not a salary as alleged by the petitioner.
11. That the Central Council has absolute power under Rule 10 (k) to:

“Expel, remove, suspend, terminate the services of any officer or staff, or stop any membership or to terminate the membership of any member of the union from union at its sole discretion.”
12. That the affected persons may appeal the decision of the Council as provided by the rules in the Union Constitution.
13. That on 18/7/2021 the National Executive Board met in the presence of the petitioner. The meeting noted non-cooperation by the Treasurer to provide documents for oversight purposes with regard to withdrawals in the sum of Kshs. 16,000,000/=.
14. That subsequent meetings were held by the Central Council on 12/12/2021 and other dates and it was discovered many irregularities with regard to making of cash withdrawals and payments.
15. That the 1st respondent held Executive Board Meetings in the presence of the petitioner, on 24th and 29th April 2022 subsequent to which the 1st respondent issued a letter of suspension to the petitioner dated 4/5/2022.
16. The petitioner responded to allegations made against him on 24/4/2022. Upon his response, the petitioner left the meeting to allow a decision to be made. It was after that meeting when the petition was suspended on half allowance.
17. That the Central Council of the 1st respondent subsequently met on 7/4/2023 at waterbuck hotel in Nakuru in the absence of the petitioner and the council resolved to remove the petitioner from office.
18. That the petitioner was subjected to an open and fair process before removal.
19. That the 1st respondent did not violate the constitutional provisions set out in the petition nor did the respondent violate any constitutional rights of the petitioner.
20. That the 1st respondent constituted under Rule 9 on the governing body of the union gave authority to the National Executive Board to discipline the petitioner and to the Central Council to remove the petitioner from office.
21. That the Constitution of the union was strictly followed before the said suspension and removal on account of malicious abuse of office and misuse of union funds as set out in the replying affidavit. That the petition lack merit and it be dismissed with costs.
22. The petitioner filed further affidavit sworn to on 21/9/2023 in which he restates his case. The petitioner states that he was entitled to payment of Kshs. 93,000/= per month in salary and allowance and that he was still under suspension and had not been removed from office lawfully since the Council did not call a meeting within 30 days in terms of Rule 10(d) upon the suspension of the petitioner to hear and determine his case. That the petitioner was not provided with any written reasons as to why the Central Council allowed the National Executive Board to subject the petitioner to an illegal and unlawful suspension.
23. That the petitioner was never questioned about the audit allegations and discrepancies alleged in the replying affidavit. That he had responded in writing to the report and recommendations of the Adhoc



- Committee. That he was not granted the opportunity to defend himself on the alleged misconduct on his part with regard to the finances of the 1st respondent.
24. That he was entitled to be given a hearing by the Central Council in its meeting held on 6/4/2023 at waterbuck hotel in Nakuru and his lawyer had demanded that the petitioner be invited for the meeting and the petitioner be given a fair hearing.
 25. The petitioner denies any allegations of misappropriation of funds and in any event, the office of secretary was responsible for handling cash and day to day matters of expenditure in the office and not the petitioner.
 26. That both the suspension and purported removal are illegal and unlawful. That the petition has merit and it be granted as prayed.

Determination

27. The parties filed written submissions which the court has carefully considered together with the depositions by the parties. The issues for determination are:-
 - i. Whether the petitioner is still in suspension or has already been removed from office of National Treasurer.
 - ii. Whether the 1st respondent violated Article 41(1) and (2) (a); 47(1) and (2) and (3); and 50(1) and (2) of the Constitution.
 - iii. Whether the 1st respondent violated any provision of Labour Relations Act, 2007 and section 46 of The Fair Administrative Action Act No. 4 of 2015.
 - iv. Whether the petitioner is entitled to the reliefs sought.
28. The court will deal with issues (i), (ii) and (iii) together based on the facts before court.
29. The petitioner at all material times to the suit remains a salaried full time Branch Secretary of the 1st respondent and has not been suspended or removed from that office.
30. The petitioner however was re-elected in the month of May 2021 as the National Treasurer of the 1st respondent for a 5 year term that runs until May 2026 having satisfied Rule 16(c) of the Union Constitution.
31. The petitioner was however removed from the position of National Treasurer in May 2022 by the Central Council on grounds of misconduct particularized as abuse of office and misuse of union funds.
32. The removal followed a report by an Adhoc Finance Committee after a meeting held on 21st to 23rd April 2022 to the National Executive Board. The report had made the following recommendations to the National Executive Board.
33. The current holder of the docket of National Treasurer:
 - a. Lacked the requisite qualification to enable him to discharge his duties in the sensitive position.
 - b. Has been unable to provide authenticated proof of expenditure vide the financial tools required.
 - c. Be suspended with immediate effect pending further investigations on the remaining period of time.



- d. The committee recommended an external auditor to be invited to take note of the anomalies already detected in the books of 1st respondent and he be suspended or removed from that office.
34. The petitioner responded in writing to the report rejecting it as a nullity in law and questioning why the Deputy National General Secretary Mr. Jacob Odundo, who is part of management of the secretariat and also handling finance and had questions to answer on the same was part of the Adhoc Finance Committee. The petitioner requested to have a fair hearing.
35. The petitioner was by letter dated 3rd June 2022 suspended from the position of National Treasurer. The letter was by the National General Secretary the 3rd respondent.
36. After more than eleven (11) months and on 6th April 2021 the Central Council convened a meeting in which the petitioner was excluded as a person to be discussed in the meeting. The Central Council proceeded to discuss the conduct of the petitioner in his absence and the petitioner was removed from the position of National Treasurer in his absence.
37. That no formal communication was made to the petitioner regarding the removal. The Central Council did not therefore provide written reasons why the petitioner was removed from the position of National Treasurer. The petitioner did not receive the minutes of the proceedings to establish what indeed took place at the meeting of the council held on 6/4/2023 in which meeting his conduct was discussed in his absence and he was removed from the elected position of National Treasurer.
38. On the basis of these facts that have not been contradicted by the respondents, the court finds that the petitioner was not granted a fair hearing prior to the removal from the position of National Treasurer in violation of Article 50(1) of the Constitution of Kenya 2010.
39. The court further finds on the basis of these un-contradicted facts that the 1st respondent engaged in unfair labour practice in violation of Article 41(1) by removing the petitioner from an elected position of National Treasurer without according him a hearing at all at the sitting of the Central Council on 6th April 2023, where allegations of misconduct against the petitioner were discussed in his absence and an adverse decision made by the Central Council removing him from the position of National Treasurer.
40. These facts also constitute violation of Article 47 (1) and (2) of the Constitution read with section 4 and 6 of The Fair Administrative Action Act, 2015, in that not only was the petitioner subjected to a disciplinary process in his absence, but an adverse decision of removal from an elected office of National Treasurer was reached at that meeting, which action deprived the petitioner not only of his official position of National Treasurer but also deprived him remuneration payable to him on a monthly basis by virtue of that elected position. The respondents are guilty of unfair administrative action against the petitioner.
41. In Shankar Sak law versus DHL Global Forwarding (k) Ltd Limited (2012 e KLR referred to in the case of Kenneth Njiru Njorani versus Dodbhia Packaging (K) Limited (2002) eKLR where it was held that;

“In making this finding the Court recognizes termination has constitutional basis as provided for in Article 47(1) of the Constitution which states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Managerial decisions by employers are properly administrative actions within the province of Article 47 of the Constitution on the right to fair administrative action. the Constitution breaks the curtains and it does not matter whether the employer is in public service or private sector. the Constitution in Article 10 clearly states that the national values and principles of



governance apply to all persons and the principles and values include human rights. Thus, in the instant case, the respondent was bound to accord the claimant the right to a fair administrative action through observation of the rules of natural justice and as expressly envisaged in Section 45 (5) of the Act.”

42. Later on, the Court observed that ‘In the instant case, a warning letter by the respondent against the claimant was issued on 24th January, 2012. The show cause notice was issued on 25th January, 2012 and the Claimant replied promptly on the same date. On 26th January, 2012, without hearing the Claimant as prescribed under Section 41 of the *Employment Act*, 2007, the Claimant was summarily dismissed. The Court finds that the Respondent acted unreasonably by failing to take into account matters that were relevant, namely, complying with the statutory requirement to hear the Claimant. Thus, the dismissal was unfair as it was in contravention of the express statutory provisions.
43. Furthermore, the respondents did not communicate in writing the reasons for the adverse action taken against the petitioner in violation of Article 47(2) which provides:-

“if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”
44. In *Priscilla Wanjiku Kihara versus Kenya National Examination Council* (KNEC)(2016) e KLR it was held that;

‘Where an administrator fails to give reasons, then the court can infer that there were no good reason; also, that if the reasons given were not the ones the administrator was lawfully and justifiably entitled to rely upon then the court is entitled to intervene’.
45. The importance for reasons was aptly stated in *Gideon Omare versus Machakos University* (2020) eKLR where the court referred to the work of Rose M. B. Antoine, in ‘*A New Look at Reasons—One Step Forward—Two Steps Backward*’ (1992) 44 Administrative Law Review where it is stated that “... reasons are essential to the efficient functioning of the machinery of good government. Such efficiency requires that decisions be well thought out and not arbitrary, both of which point to the giving of reasons as a fundamental part of the decision-making process. The giving of reasons affords the decision-making process a measure of impartiality and gives the appearance that decisions are free from impartiality and bias, thus encouraging public confidence in the system of administration. Reasons also tend to give legitimacy to administrative decisions, encouraging acceptance of a decision, even where adverse to the person affected, since reasons appear rational, unbiased, and logical. Reasons are essential to the adequate functioning of the appeal process, as they enable the person affected to know whether it is possible to challenge a decision, and if so, upon what grounds. Reasons also enable a reviewing authority to better understand the basis of the decision, thus allowing that authority to better carry out the appellate function effectively. Reasons form part of the general ideals of due process, that is, that the principles of natural justice and fairness be carried out in any decision-making process.
46. This is an inalienable right, that was elaborated under section 6 of The *Fair Administrative Action Act*, 2015. The respondents violated the right of the petitioner in this respect.
47. The respondents have continued to deny the petitioner by fact of the unlawful and unfair removal from office of his remuneration to his loss and detriment.
48. The court finds that the petitioner has proved on a balance of probability that his rights set out in the petition have been violated by the respondents to his loss and detriment.



49. The position of National Treasurer being an elective position should not be treated lightly and the occupant removed in a whimsical manner as happened to the petitioner.
50. The grave allegations raised by the Adhoc committee and in the audit report were not specific to the National Treasurer exclusively but were management matters the docket of the National Executive of the union collectively as is stated by the petitioner. All involved ought to have been subjected to scrutiny to rectify any administrative or financial short falls revealed in the audit report.
51. In the final analysis, the petition has merit and is allowed and consequently the court makes the following final orders:-
- i. The removal of the petitioner from the position of National Treasurer by the Central Council was unlawful, unfair null and void.
 - ii. The petitioner is and still remains the elected National Treasurer of the 1st respondent as provided for under the Constitution of the union and is entitled and should be paid his full salary and allowance in this capacity, unless otherwise lawfully removed from the office of National Treasurer in compliance with the Constitution of the union.
 - iii. An order is issued quashing the decision by the Central Council of the 1st respondent reached at the annual Central Council meeting of 6th April 2023 or any other meeting removing the petitioner from the office of the National Treasurer.
 - iv. An order is issued directing the respondent to pay the petitioner his full remuneration with respect to the elected position of National Treasurer from the date of suspension and subsequent removal to date. Computation to be done and filed for approval by the respondents within 14 days. The petitioner to file rejoinder within 14 days of service.
 - v. An order is issued directing the respondent to reinstate the petitioner to the position of the National Treasurer with full remuneration from date of suspension to date.
 - vi. The respondents to pay the costs of the petition.
 - vii. For the avoidance of doubt, the court does not grant other general and punitive damages sought in the petition in consideration of the reliefs granted above.

DATED AT NAIROBI THIS 20TH DAY OF MARCH 2024

Mathews Nderi Nduma

JUDGE

Appearance:

Mr. Okonjo for petitioner

Ms. Maringa for respondents

Mr. Kemboi Court Assistant

