



**Joseph v Kenya Medical Research Institute (K.E.M.R.I) (Petition
E80 of 2023) [2024] KEELRC 505 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 505 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E80 OF 2023**

B ONGAYA, J

MARCH 7, 2024

**IN THE MATTER OF DENIAL OF RIGHTS, VIOLATION AND INFRINGEMENT OF
ARTICLES 27, 28, 41,47 OF THE CONSTITUTION OF KENYA, 2010 IN THE MATTER
OF SECTIONS 3, 4 & 12 OF FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015**

**IN THE MATTER OF STATE CORPORATIONS
ACT, LEGAL NOTICE NO. 35 OF MARCH 2021**

**KEMRI HUMAN RESOURCES POLICY AND PROCEDURES
[JANUARY 2019] [HEREINAFTER THE MANUAL]**

**IN THE MATTER OF ARTICLE 258(1), ARTICLE 22, AND RULES 23(1) AND
(2) AND 24 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013**

**IN THE MATTER OF EMPLOYMENT AND LABOUR
RELATIONS COURT ACT AND THE EMPLOYMENT ACT 2007**

BETWEEN

BENJAMIN MANG’OKA JOSEPH PETITIONER

AND

KENYA MEDICAL RESEARCH INSTITUTE (K.E.M.R.I) RESPONDENT

JUDGMENT

1. The petitioner filed the petition dated 25.04.2023 through M. Owenga & Co. Advocates seeking the following reliefs against the respondent:
 - a. A declaration that the respondent’s actions amounted to unfair labour practice.
 - b. A declaration that the petitioner had a legitimate expectation to work till his retirement age and as long as he was accorded fair treatment as well as favourable working environment which



expectation was cut short through the Respondent's unconstitutional, unfair, unreasonable and unlawful conduct which amounted to the contravention of the Petitioner's fundamental rights and freedoms.

- c. A declaration that the Respondent's decision to summarily dismiss the Petitioner was discriminatory, procedurally unfair and without evidence or reasonable basis and thus it amounted to violation of *the Constitution* and fundamental rights of the Petitioner as pleaded and particularized the petition hence null and void ab initio.
 - d. Damages for violation of the Petitioner's fundamental rights under Article 27(1), 41 and 47 of *the Constitution*.
 - e. An order of certiorari to bring to the Honourable Court and quash and set aside the decision of the respondent as captured in his dismissal letter dated 15th February 2022 with the net effect that the Petitioner is reinstated to his rank without loss of salary and benefits.
 - f. Costs of the suits.
 - g. Any other relief that the honourable court may deem fit to meet the ends of justice.
2. The petition was based upon the petitioner's supporting affidavit and annexures thereto filed together with the petition and sworn on the 24th of April 2023. The petitioner's case is as follows:
- a. The respondent employed him on 16th April 2002 as Supplies Assistant 1 and he worked until February 2015.
 - b. That in May 2016 he had enrolled for undergraduate studies in Daystar University to pursue a Bachelor of Commerce. The approval was obtained in May 2016 per letter dated 18.05.2016 by Ruth N. Mkoji for the respondent's Managing Director.
 - c. That in 2017 vide a letter dated 12th May 2017 he was posted to Centre of Infectious & Parasitic Disease Control Research (CIPDCR) for deployment as Assistant Administrative Officer MR/7.
 - d. That on 24th August 2017 he wrote to the Director of the respondent appealing the transfer since he had already secured a four-year study leave. The letter states that Daystar University did not have a branch in Busia so that by the deployment his studies would suffer as he had already paid fees for a full academic year. Further, re-designation to the administrative cadre from that of supply chain and procurement would kill his career as he had invested heavily in his chosen career. He explained that he had been given permission in 2015 to attend evening classes for the full period of the bachelor's course.
 - e. That the Director, CIPDCR at Busia vide a letter dated 27th September 2017 indicated that the services of the Petitioner were not needed there thus, "Due to the complexity of managing CIPDCR, we regret that we are not able to ringfence specific skills and resources to oversee him". The letter stated that the petitioner had not reported at Busia but had written on 05.09.2017 notifying that he was a student at Daystar University in session and would therefore delay his reporting and that he had informed the acting head of human resource accordingly.
 - f. That in June 2020 after obtaining a Masters' degree and membership of the Kenya Institute of Supplies Management (KISM) he requested to be redeployed to the Procurement department.
 - g. That while awaiting the response he received a letter dated 23rd June 2021 regarding his alleged refusal to proceed to transfer to Busia per transfer letter dated 12.03.2017 requiring him



to report to the Centre for Infectious & Parasitic Disease Control Research (CIPDCR) for deployment. The letter concluded thus, “You are hereby expected to report to the Deputy Director, CIPDCR with immediate effect. Please note that failure to comply with lawful and properly made instructions is an offence which will lead to disciplinary action being taken against you.”

- h. That he responded to the letter by his letter dated 28.06.2021 and gave his reasons. He stated that by letter, dated 27.11.2017, he was re-designated Administrative Assistant Job Group MR/7 and sent to the Director CIPDCR but there was no official transfer letter. Further, at the time, he had enrolled for the Bachelor of Purchasing and Business Logistics at Daystar University for a period of 4 years effective 11.01.2016 and requested for the transfer to be put on abeyance to enable him complete the studies in circumstances that the University had no branch in Busia. He stated that he was ready to report to Busia having completed the studies but unfortunately his wife had passed away and interred on 02.04.2021 and he had to solely take care of the children. In the circumstances, he requested to be transferred in any respondent’s workstations within Nairobi.
- i. The petitioner received a letter to show-cause dated 24.08.2021 for failing to report to CIPDCR – Busia for deployment after his appeal against the deployment was declined. His salary was stopped with immediate effect and he was to respond in 7 days. The petitioner received the letter on 30.08.2021 at 12.30pm from one Professor Matilu. The petitioner replied by his letter dated 31.08.2021 that he had not received a reply to his appeal of 23.06.2021 and repeated the contents of his letter dated 28.06.2021.
- j. That in the disciplinary hearing held on 9th February 2022 he was not allowed to talk about the letter by the Director CIPDCR Busia, which had indicated that his services were not needed there. That he was also not allowed to talk about being on study leave.
- k. That the disciplinary process was marred with biasness, irregularity, witch hunting and mischief.
- l. That he later reported to Busia but his salary had already been stopped.
- m. That at the time of dismissal he made several follow ups on his appeals but did not get a response nor directions from the human resource management.
- n. The letter of summary dismissal was dated 16.02.2022. It was because of not reporting on duty from May 2022 to 10.11.2021 and failure to report to Busia per letter dated 23.06.2021. The letter stated that he was found culpable of absence from duty and insubordination. The dismissal was effective 10.02.2022 for absence from duty without permission and failing to obey lawful and proper command.
- o. He appealed by the letter dated 24.02.2022. He stated as follows: transfer by letter dated 23.06.2021 to CIPDCR – Busia was at a time he was not in a steady mental status as he had lost his wife in April 2021; by letter of 28.06.2021 he had appealed and requested to be deployed within Nairobi so as to take care of the children; the disciplinary letter dated 28.06.2021 being show-cause letter stopped his salary effective August 28.06.2021 prior to reply to his appeal and prior to preliminary report per clause 11.9.17 of the manual; he had short notices to prepare his defence; and his prevailing circumstances had not been carefully considered.
- p. By letter dated 07.03.2022 the State Department for Public Service wrote to the Psychiatrist in Charge at Kiambu Level 5 Hospital that the petitioner had presented himself for counselling services at the Department as self-referred client, had attended two sessions, and, the assessment



was that he needed further psychological assessment to enable the Department devise an effective treatment plan.

- q. By letter dated 16.03.2022 the Hospital issued the petitioner's medical report thus, "The above named has been reviewed in our clinic and detailed history taken, evaluation and assessment revealed that he has major depressive disorder mainly resulting from major life losses including death of his wife in March 2021 and unfair dismissal from work. I hereby recommend that he continues with both pharmacological therapy and psychotherapy to help him deal with his losses." Dr. Waturu Kibuti signed the report.
- r. He contended that his constitutional rights had been violated as well as the provisions of the respondent's human resource and procedures manual, 2019. That the manual provides for responses to be made within 30 days yet he had not received any response.
- s. By letter dated 01.04.2022 the state Department for Public Service wrote to Professor Sam Kariuki, Ag. Director General of the respondent confirming the petitioner was receiving psychotherapy being a combination of medication and intensive counselling that was to take 6 months and that he had taken three sessions and was responding well. The recommended further therapies were to be once per week. The letter concluded, "The purpose of this letter therefore, is to report on the counselling progress and request you to accord our client the necessary support which is critical in facilitating his recovery." Grace Wanjiku J. signed the letter for the Principal Secretary.
- t. The Union of Kenya Civil Servants intervened by the letters dated 04.04.2022 and 27.04.2022 and by letter dated 23.05.2022 Rowland Munyeshi, Ag. Deputy Director (HRM) informed the Union Secretary General that the petitioner's appeal against the dismissal was received and would be deliberated by the Board and the officer informed the Board's resolution. Again, by letter dated 24.08.2022 the respondent informed Hon. Tom M. Odege, Union Secretary General that the appeal had been presented to the Board for deliberation and the Board of Directors would communicate the decision.
- u. That he had produced relevant documentation and evidence of being away pursuing further studies hence not available during the period of 2016-2020.
- v. That the respondent was aware that the claimant had just lost his wife and had young children to attend to despite sending him on transfer.
- w. That the petitioner has suffered mentally and a report availed to the respondent who then referred him to the staff clinic for reassessment, which they should have done, in the first instance.
- x. That the Union of Kenya Civil Servants has tried to intervene on behalf of the petitioner in vain.
- y. That the process of transferring him and how his appeal was handled was unlawful and in breach of the law as pleaded.
- z. The petitioner delivered on 03.04.2023 his 2nd appeal to the respondent as dated 27th March. By letter dated 30.03.2023 the respondent informed the petitioner that per clause 11.15.4 of the Manual he was entitled to only one appeal but he was at liberty to appeal to the Public Service Commission through the Director General per section 74 of the [Public Service Commission Act, 2017](#). The demand and notice to sue was made for the petitioner by M. Owenga & Company Advocates per letter dated 10.03.2023. The petitioner's case is that the decision to transfer him



to Busia and the subsequent summary dismissal were in violation of the right to fair labour practices under Article 41 and the right to fair administrative action under Article 47 of *the Constitution* of Kenya, 2010.

- aa. He also supported his petition by annexed documentation.
3. The respondent filed the replying affidavit of Rowland Muyeshi, the Principal Human Resource Officer of the respondent and sworn on the 1st of December 2023. It was filed through the firm of Kipyator Kibet and Associate Advocates. It was urged as follows:
- a. The petitioner was an employee of the respondent until his summary dismissal on the 16th of February 2022.
 - b. That the petitioner was lawfully dismissed.
 - c. That the petitioner was lawfully transferred to the respondent CIPDCR in Busia but did not report to the new station. The letter of the said transfer dated 12th May 2017 is exhibit RM-2.
 - d. That the Respondent's Director at Busia wrote to the Head Office on 27th September 2017 about the failure by the petitioner to report to his new station. The letter is exhibit RM-3.
 - e. That the petitioner wrote to the respondent on 24th August 2017 through the HR requesting to defer the transfer and re-designation.
 - f. That on vide a letter dated 4th May 2021 the respondent invited the petitioner to attend a disciplinary meeting for plucking the original documents from the CRM local purchases file that went missing on roof repairs to CMR laboratory and annexed the letter as RM-5.
 - g. That on 12th May 2021 the petitioner attended the disciplinary meeting on charges that, he has not been reporting to anyone since his deployment to Busia and that he has not been working for the Respondent. The Committee resolved that the petitioner report to CIPDCR Busia with immediate effect and annexed the minutes as exhibit RM-6.
 - h. That the appeal by the petitioner not to be transferred to Busia was declined and the petitioner was formally informed as well as stoppage of his salary.
 - i. The respondent stated that from the response made by the petitioner to the notice to show cause validated his termination and the findings of the Disciplinary hearing held on 09.02.2022.
 - j. The respondent stated that the procedure to summarily dismiss the petitioner was in accordance with the law being section 44 of *Employment Act* and the KEMRI Human Resource Policy and procedures manual as well as *the Constitution*.
 - k. The respondents stated that they were well within the law in dismissing the petitioner and that the petition should be dismissed with costs.
4. The petitioner filed a further affidavit to the response by the respondent and sworn on 23.01.24 in which he denied the contents of the respondent's affidavit. He admitted only the issues as had been raised in his response to the notice to show cause as was exhibited by the respondent. The petitioner stated that he had made out clearly the aspects of violations of his rights and opposed the averments in the replying affidavit by the respondent.
5. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.



6. To answer the 1st issue, there is no dispute that the at all material times the parties were in a contract of service.
7. To answer the 2nd issue, the Court returns that the re-designation and transfer of the petitioner by the respondent by the letter dated 12.05.2017 was unfair and unlawful. While making that decision the Court observes as follows:
 - a. The petitioner was employed as Storeman II on 16.04.2002. He thereafter embarked to study and develop himself per the designation. On 31.12.2020, the Kenya Institute of Supplies Management issued him the Supplies Practitioner's Licence. He was admitted as a member of the Institute per certificate dated 24.06.2020. The Chartered Institute of Purchasing and Supply awarded him CIPS Level 4 Foundation Diploma in Purchasing and Supply on 12.08.2009. By letter dated 18.05.2016 the respondent issued course approval for the petitioner to pursue Bachelor of Commerce in Purchasing and Logistics at Daystar University for a period of 4 years effective 11.01.2016. The approval letter stated thus, "You will therefore leave the office at 4.30 pm in order to attend the evening classes on time. Please note that you are required to submit progress reports on your course to the Director, KEMRI. We wish you all the best in your studies." The evidence by the petitioner and which is not rebutted is that he was paying for the approved course by himself and not by the respondent or other scholarship.
 - b. By letter dated 23.08.2017 Daystar University confirmed that the petitioner was pursuing the course as approved.
 - c. By letter dated 01.07.2019 the University confirmed that the petitioner successfully completed the course requirements and had graduated on 09.06.2019 and the degree certificate would be ready in August 2019. The petitioner has exhibited the academic transcripts in that regard.
 - d. By letter dated 17.01.2020 the respondent congratulated the petitioner for award of the Bachelor of Commerce- in Procurement and Business Logistics. The letter stated that the skills obtained would go to enhance service delivery in the institute. The petitioner has exhibited the degree certificate awarded at the graduation congregation held on 29.06.2019. The Court finds that the petitioner obtained the approval to study and complied with the conditions attached by the respondent to attend evening classes and as well satisfied the requirements of the study program.
 - e. The evidence is that the petitioner did not ask to re-designate. He was a Supplies Assistant I being re-designated to Administrative Officer Job Group MR/7. Conditions for re-designation are set out under section 40 of the *Public Service Commission Act, 2017*. Re-designation entails change of an officer's career path and under section 40(2) of the Act, it is initiated by the officer and which has not been shown to have been the case in the instant petition. For an officer to be re-designated per section 40(3) the office must be vacant, the officer must meet all qualifications, the re-designation must not disadvantage the officers already serving in the cadre, the officer must have consented to be redesignated, and the decision shall not reduce the officer's salary. Regulation 35 of the Public Service Commission Regulations, 2020 repeat the same safeguards on re-designation. The Court finds that in issuing the letter dated 12.05.2017, the respondent has not shown that the statutory conditions had been satisfied prior to re-designating the petitioner.
 - f. The letter by Prof. Matilu Mwau, Director, CIPDRC dated 27.09.2017 confirms that the petitioner had not reported as transferred and re-designated by reason that the petitioner had written on 05.09.2017 that he would delay because he had informed the Ag. HR Head that



he was attending as a student at Daystar University. Further, that CIPDCR at Busia lacked specific skills and resources to oversee the petitioner as had been transferred and re-designated.

- g. The Court finds that indeed, in view of the foregoing observations the impugned re-designation and transfer decision was unreasonable, oppressive, unlawful and a violation of Articles 41 on fair labour practices and Article 47 on fair administrative action as urged and submitted for the petitioner. The Court finds that the respondent's assertion that the transfer was lawful was misleading as was reckless in view of the cited applicable statutory provisions. While making that finding the Court further finds that the petitioner had a valid grievance. He was serving in the Supplies and Procurement Department and had taken steps to train, learn and equip himself professionally to continue serving as such. He received the respondent's approval and congratulations for expended steps to enhance his capacity. The re-designation was without his consent per mandatory statutory provision. The Busia office confirmed the transfer was inconsistent with the needs or capacities at Busia. In those circumstances, the petitioner had a valid grievance to object to the deployment. He raised it prior to disciplinary process by his letter of 05.09.2017. He also raised the grievances together with his subsequent tragedy of becoming a widower and single parent throughout the disciplinary process and the administrative appeal. Under section 46 of the Employment Act, 2007, it was unfair not to address the grievance and for the respondent to instead dismiss the petitioner summarily despite his grievances about the transfer and re-designation and then the death of his wife.
8. To answer the 3rd issue, the Court finds that the reasons for the summary dismissal were unfair as were not justified or genuine. The Court has already elaborately found that the re-designation and transfer were unlawful yet the same constituted the root cause of the summary dismissal. The transfer to Busia by letter dated 23.06.2021 referred to the letter of re-designation and transfer dated 12.03.2017. By letter of 28.06.2021, the petitioner raised the grievances and explanations about death of his wife, being a single parent, and his earlier approval to attend studies at Daystar University. Prior to addressing the grievances, the show cause letter was delivered belatedly and the petitioner subsequently dismissed summarily. The respondent's case that the petitioner was absent from duty from May 2021 to 10.11.2021 was not mentioned in the letter to show-cause and the Court finds he was not given a chance to exculpate. The evidence was that he had presented a grievance about allegation of insubordination for not taking up the transfer and redesignation – which has been found to be unlawful. The reasons for summary dismissal were not genuine per section 43 of the Employment Act as did not relate to the petitioner's conduct, capacity, or respondent's operational requirements per section 45 of the Act. It appears that the despite the advisory by the State Department for Public Service, the respondent took no steps to remedy the petitioner's circumstances. The appeal appears not to have been determined and the advisory not acted upon. It was unfair in substance and procedure.
9. The 4th issue is on remedies. The Court returns as follows:
 - a. The petitioner is entitled to a declaration that the respondent's actions amounted to unfair labour practice.
 - b. The petitioner is entitled to a declaration that the petitioner had a legitimate expectation to work till his retirement age and as long as he was accorded fair treatment as well as favourable working environment which expectation was cut short through the respondent's unconstitutional, unfair, unreasonable and unlawful conduct which amounted to the contravention of the Petitioner's fundamental rights and freedoms.
 - c. The petitioner is entitled to a declaration that the respondent's decision to summarily dismiss the Petitioner was discriminatory, procedurally unfair and without evidence or reasonable basis



and thus it amounted to violation of *the Constitution* and fundamental rights of the Petitioner as pleaded and found, hence, null and void ab initio.

- d. No submissions were made to guide the Court on damages for violation of the Petitioner's fundamental rights under Article 27(1), 41 and 47 of *the Constitution*. Accordingly, the Court considers that the remedies that will be awarded will meet the ends of justice especially that consequential to grant of certiorari, the petitioner will revert to the employment without break in service effective the date of summary dismissal and with full back payment.
- e. The petitioner is entitled to an order of certiorari to bring to the Honourable Court, quash, and set aside the decision of the respondent as captured in his dismissal letter dated 15th February 2022 with the net effect that the Petitioner is reinstated to his rank without loss of salary and benefits.
- f. The petitioner is entitled to the costs of the suit.

In conclusion, judgment is hereby entered for the petitioner against the respondent for:

1. The declaration that the respondent's actions amounted to unfair labour practice.
2. The declaration that that the petitioner had a legitimate expectation to work till his retirement age and as long as he was accorded fair treatment as well as favourable working environment which expectation was cut short through the respondent's unconstitutional, unfair, unreasonable and unlawful conduct which amounted to the contravention of the petitioner's fundamental rights and freedoms and as found in the judgment.
3. The declaration that the respondent's decision to summarily dismiss the Petitioner was discriminatory, procedurally unfair and without evidence or reasonable basis and thus it amounted to violation of *the Constitution* and fundamental rights of the Petitioner as pleaded and found, hence, null and void ab initio.
4. The judicial review order of certiorari hereby issued bringing to the Honourable Court and quashing by setting aside the decision of the respondent as captured in his dismissal letter dated 15th February 2022 with the net effect that the petitioner is reinstated to his rank without loss of salary and benefits; with full back payment from the date of the dismissal.
5. Consequential to order (4), the accruing payments be made by 01.09.2024 and the petitioner deployed forthwith failing interest to be payable at Court rates until full payment.
6. The respondent to pay petitioner's costs of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 7TH MARCH 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

