



Barasa v Principal Secretary, Ministry of Interior & Coordination of National Government & 2 others; Public Service Commission (Interested Party) (Employment and Labour Relations Petition E131 of 2021) [2024] KEELRC 1643 (KLR) (28 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1643 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E131 OF 2021**

**K OCHARO, J
JUNE 28, 2024**

BETWEEN

BARNABAS OTWANE BARASA PETITIONER

AND

**THE PRINCIPAL SECRETARY, MINISTRY OF INTERIOR &
COORDINATION OF NATIONAL GOVERNMENT 1ST RESPONDENT**

THE DIRECTOR GENERAL, IMMIGRATION SERVICES 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

AND

THE PUBLIC SERVICE COMMISSION INTERESTED PARTY

JUDGMENT

1. Through a petition filed herein on 17th August 2021, dated 16th August 2021, the Petitioner sought against the Respondents jointly and severally;
 - I. An order that the two transfers following each other is unlawful, discriminatory and unconstitutional;
 - II. A declaration that the Respondents breached the Petitioner’s rights to fair Labour practices;
 - III. An order of Mandamus to compel the Respondents to allow the Petitioner to continue working at Kisumu while they calculate his salary progression and the allowance; and
 - IV. Any other relief this Honourable Court may deem just and appropriate to grant.



2. The 1st, 2nd, and 3rd Respondents resisted the petition vide the grounds of opposition filed herein dated 20th June 2022, while the Interested Party did so through a replying affidavit sworn by Dr. Simon K. Rotich, CBS sworn on the 1st August 2023.

The Petition

3. The Petitioner contends that prior to the institution of the petition herein, he was a Civil Servant attached to the Department of Immigration, in the Ministry of Interior and Coordination of National Government Office of the President as a senior Clerk.
4. During his employment, he was accused of stealing by servant, arraigned in court and charged vide Nairobi Chief Magistrate's Court, Criminal Case No. 393 of 2016. Pending the hearing and determination of this case, they were placed under interdiction. Further, on the 30th January 2020, they were acquitted of the charge[s] as the trial Court found that they had no case to answer.
5. He further alleged that while his colleagues with whom he had been charged were deployed immediately after the acquittal, he was not. He was only deployed after he moved to court.
6. The petitioner stated that on 19th April 2021, he was deployed on transfer to Kisumu regional office. As a result, he reported to the new station on 4th May 2021. Before he could settle down, in the new station, he was informed that he had been transferred to Nairobi to a new department, the State Department of Industrialization. The transfer was effective on 12th May 2021. On 16th June 2021, he was released to the new department.
7. The Petitioner further stated that all these happened before the Respondent could pay him the transfer allowance for the transfer from Nairobi to Kisumu, and compute his salary progression.
8. The Respondent's action[s] was retaliatory, aimed to punish and frustrate him for successfully defending the accusations they had made against him, in the criminal matter forestated.
9. Transferring him to another ministry before he could even settle down to another ministry without paying him the first allowance amounts to discrimination as this does not happen to other civil servants.
10. The Petitioner contends that his right not to be discriminated against under Article 27 of the Constitution was violated. He was treated differently from the other employees with whom he was an accused person in the criminal matter.
11. He further asserted that the Respondents violated his Constitutional rights under Articles 41 and 47 of the Constitution of Kenya, 2010.

The Opposition By the 1st, 2nd, and 3rd Respondents.

12. The Respondents argue that Regulation 36 of the Public Service Commission Regulations, 2020 empowers the Public Service Commission to undertake deployment and or transfers of Public Officers to various stations within the Public Service for purposes inter alia enhancing efficiency and effectiveness of public service delivery.
13. The Respondents state further that the deployment exercise is part of the regular review of public officers in the public service, therefore, the Petitioner's contention that his transfer was actuated by malice of victimization, is unfounded.
14. It was further argued that the Court has no authority to bar an employer from discharging its lawful human resource functions such as effecting transfers of employees, as if it were to do so, the same



- shall amount to diminishing the prerogatives guaranteed to the employer under the *Public Service Commission Act*, the Regulations thereunder and the *Constitution*.
15. Further, the Respondents acted strictly within their mandate as per the contract of employment and the law. It cannot be available for the Petitioner to argue that there was a violation of law and the *Constitution*, therefore.
 16. The Respondents argue that there are no outstanding allowances either with regard to the Petitioner's transfer or at all. His allegation that there were stands on quicksand. Further, the Petitioner's allegation that the Respondents want to terminate his services remains a bald allegation not supported by any evidence.
 17. Lastly, granting the orders sought would be against public policy and would open floodgates for challenging lawful decisions for the transfer of employees in the Public Service.

The Interested Party's Response.

18. The Interested Party contended that it is a Constitutional Commission within the meaning and tenor of Chapter 15 of the *Constitution*. Further, its constitutional functions are elaborately provided for under Articles 234 and 252 thereof.
19. The Interested Party stated that it is common cause that the Petitioner was charged in Nairobi CMC CRC. No. 393 of 2016 [Republic v Barnabas Otwani Barasa & 2 Others] with 9 counts of stealing by persons employed in the public service. Additionally, during the pendency of the criminal trial, he was placed under interdiction.
20. On the 30th January 2020, the trial Magistrate found the Petitioner and his co-accused with no case to answer and consequently acquitted them.
21. Through a letter dated 30th March 2021, the Cabinet Secretary Ministry of Interior & Coordination of National Government discharged the Petitioner's interdiction and issued him with a warning. Subsequently, he was transferred from Immigration Headquarters to Kisumu Regional Office, through a letter dated 19th April 2021. He duly reported to the new station and was deployed accordingly as evidenced by the letter dated 4th May 2021 by the Deputy Director of Immigration Services Nyanza Region.
22. The gravamen of the Petitioner's petition is that his transfer from one workstation to another, and the withholding of salary upon, the lifting of the interdiction that was imposed on him during the pendency of the criminal trial was a breach of his constitutional rights.
23. The Interested Party further stated that the transfer or deployment of public officers is the responsibility of the Public Service Commission which may be exercised by relevant Authorized Officers per Section 43 of the *Public Service Commission Act*, 2017 and the Regulations thereunder as it happened in the instant matter.
24. The Interested Party has the powers under the *Constitution*, the *Public Service Commission Act*, 2017 and the Regulations, to; interdict, suspend; stop, withhold or defer a normal increment of salary; reprimand; stop pay or salary; recover the cost or part of the cost for any loss or breakage caused by default or negligence; defer the increment in salary; defer the promotion; dismiss or reduce the rank or seniority; of any Public Officer.
25. The Interested Party argued that the pendency of the criminal proceedings couldn't be taken as a bar to the Ministry initiating an administrative action against the Petitioner. Further, under Section 70[2] & [3] of the *Public Service Act*, 2017, the Petitioner could not be entitled to the half salary that



was withheld during the period of interdiction as after the lifting of the interdiction, a sanction was imposed on him, a warning.

26. The Interested party asserted that the petitioner's petition must fail as he has not; demonstrated that the transfer was afflicted by illegality; pleaded with specificity the alleged violation of constitutional rights; and set forth how the alleged rights have been violated.

The Petitioner's Submissions.

27. The petitioner identified three issues for determination thus; was the petitioner discriminated against by being transferred within months without being paid allowances? was the transfer without allowance victimization and punishment; and was the stoppage of salary legal?
28. Counsel for the Petitioner submitted that the 1st Respondent issued a transfer letter through the Director General Immigration Services dated 19th April 2021 transferring the petitioner to Kisumu Regional Offices with immediate effect. The Petitioner reported to the new station on 4th May 2021. As he was processing his pay and allowances, again on the 12th of May 2021 he received a letter transferring him to Nairobi, State Department of Industrialization hardly a month of reporting. Thereafter, his salary was stopped up to date.
29. Transferring the Petitioner from one station to another within a month, amounted to unreasonable working conditions. This coupled with the fact that his salary was unjustifiably withheld amounted to unfair labour practice on the part of the Respondents and therefore, a violation of the Petitioner's right guaranteed under Article 41 of the *Constitution*.
30. It was further submitted that the petitioner was singled out, as a result, his right not to be discriminated against under Article 27 of the *Constitution* was violated.
31. Submitting on the infringement of the Petitioner's right to *fair administrative action act* under Article 47 of the *Constitution* of Kenya, 2010, Counsel for the Petitioner submitted that transferring the Petitioner from one station to the other without first paying his allowances contravened what the constitutional provision envisages.

The Respondents' Submissions.

32. The Respondents' Counsel distilled two issues for resolution thus; whether the transfer of the petitioner was lawful and procedural; and whether the Petitioner is entitled to the reliefs sought.
33. Counsel submitted that the transfer and deployment of staff within the Public Service is regulated by Section 43 of the *Public Service Commission Act*, 2017, Regulation 36 of the Public Service Commission Regulations, 2020 as read together with Section B.31 of the Human Resource Policies and Procedures Manual for the Public Service. Considering the provisions, and the facts of the instant matter, it is not difficult to conclude that the Respondents acted within their legal mandate to transfer the Petitioner, therefore, the allegations that they violated the law and the *Constitution* are unfounded.
34. Courts will seldom interfere with the employer's human resource functions. To buttress this submission reliance was placed on the case of *Hezekiah Chepkwony & 2 others v Cabinet Secretary, Ministry of Health & 2 others* [2020] eKLR.



Interested Party's Submissions

35. The Interested Party posed three questions for resolution; Has the petitioner's rights been violated as alleged? Has the petitioner complied with the exhaustion doctrine? Has the petitioner made a case for the issuance of an order of mandamus? And does the petition have any merit?
36. The Interested Party echoed the Respondents' submissions that the transfer of the Petitioner was effected pursuant to the provisions of the *Public Service Commission Act*, the Regulations thereof, and the Constitutional powers conferred on it. The Petitioner failed to demonstrate that the transfer was unlawful. This Court cannot therefore interfere with the decision to transfer him. To support this submission reliance was placed on the case of *Severine Luyali v Ministry of Affairs & International Trade & 3 others* [2014] eKLR.
37. The Interested Party further submitted that it was within the law for the Petitioner to be interdicted, and have his half salary withheld, and under Section 70[2] & [3] the withheld salary not released to him at the lifting of the interdiction as a sanction had been imposed on him.
38. It was further argued that the Petitioner didn't plead specifically the nature of the rights violated and the manner of violation as per the principle set out in the *Mumo Matemo*, and *Anerita Karimi* Cases.
39. Submitting on the doctrine of exhaustion, Counsel for the Interested Party stated that if the Petitioner was aggrieved by the decision to have him transferred, then he ought to have lodged an Appeal to the Commission against the decision of the Authorized Officer before Approaching this Court for redress, as that is what Section 74 of the Act, and Regulation 77 command. This submission is further fortified by the fact that under the Public Service Act, and the Public Service Regulations, 2020, the Interested Party has both review and Appellate powers over decisions by all Authorized Officers in the Public Service.
40. Counsel urges this Court to find that the Jurisdiction of this Court has been prematurely invoked. Pursuant to Section 9 of the *Fair Administrative Action Act*, of 2015 the Court should direct the Petitioner first to exhaust the internal appeal Mechanisms as provided in the Act and the Regulations. Further, the Court should allow itself to be persuaded by the decision in *Jeremiah Memba Ocharo v Evangeline Njoka & 3 Others* [2022] eKLR.

Analysis and Determination

41. I have carefully considered the Petitioner's petition, the responses thereto and the submissions by the Parties, and the following issues emerge for determination thus;
 - I. Whether the Petitioner's petition meets the threshold of a properly drawn and presented petition.
 - II. Whether the Respondents violated the Petitioner's rights set out in the petition.
 - III. Whether the Petitioner is entitled to the reliefs sought.

Whether the Petitioner's Petition meets the threshold for a properly drawn and presented petition.

42. The Respondents and the Interested Party vigorously and firmly contended in their responses and submissions that the Petitioner's petition does not meet the threshold of a well-presented petition. This position is presented on two fronts. First, the Petitioner hasn't pleaded with clarity and particularity how the alleged violation of his rights occurred. Second, the petition was prematurely filed, the exhaustion doctrine militates against the petition, therefore.



43. It is a golden requirement that whenever in constitutional litigation or any other form of litigation, a party alleges that his or her rights in the Bill of Rights have been violated, the party must with clarity and particularity demonstrate through his or her pleadings the manner in which the alleged violation occurred. This principle aligns well with and, facilitates the essence and purpose of pleadings in controversies.
44. I have carefully studied the Petition as crafted and presented by the Petitioner, and hesitate not to conclude that it does not bring out in any sufficient manner or at all how the Respondents violated the stated rights. The submissions filed by Counsel for the Petitioner are no better in this regard. However, I state this without losing sight of the fact that submissions are never a substitute for pleadings and evidence, to the extent then that even if the Petitioner's submissions were to bring on board the particulars that are wanting in the petition, nothing could turn on the onboarded particulars.
45. Having found as I have hereinabove, I find it unnecessary to proceed to interrogate the other issues identified for determination. This Petition is not properly crafted and presented. It falls at this hurdle.
46. In the upshot, it is hereby dismissed. Each Party is to bear its own costs.

READ, SIGNED AND DELIVERED THIS 28th DAY OF JUNE, 2024.

.....

OCHARO KEBIRA

JUDGE

In the Presence of:

Ms. Wangeci for Ogosso (Mr.) for Public Service Commissioner

No appearance for the Respondent

No appearance for Petitioner

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

.....

OCHARO KEBIRA

JUDGE

