



**Mwangi v Attorney General & 2 others (Petition E163 of 2022)  
[2024] KEELRC 2251 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2251 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E163 OF 2022  
BOM MANANI, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**THUITA MWANGI ..... PETITIONER**

**AND**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTION ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner has instituted these proceedings to challenge the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' decision to charge him with a corruption case, a matter which necessitated his stepping aside from employment and perhaps his eventual retirement from service. The Petitioner contends that the decision was driven by ulterior motive and violated his constitutional rights.
2. In the Petition dated 31<sup>st</sup> August 2022, the Petitioner avers that before his contract was terminated, he had been serving the Government of Kenya as a career civil servant. He contends that whilst he was at the Ministry of Foreign Affairs, the Government of Kenya entered into a transaction through which it sought to purchase the property described as 3-24-3 Yakumo Meguro-Ku in Japan to house its Embassy. The Petitioner avers that he was involved in the transaction.
3. It is his case that the proposed purchase followed due process. As such, the transaction was above board and was not tainted with illegality.
4. The Petitioner contends that as the transaction was underway, the Kenyan Government raised concerns about it leading to an inquiry into the matter. He contends that during the inquiry, he cooperated with those who were tasked to investigate the transaction with the hope that his fundamental rights and freedoms would be protected in accordance with the law and *the Constitution*.



5. The Petitioner avers that despite his belief that the transaction was untainted with illegality, the 2<sup>nd</sup> Respondent maliciously and without lawful justification recommended his arrest and prosecution over alleged corruption in respect of the matter. As a result, he was arrested together with other persons and charged with a corruption offense.
6. The Petitioner avers that on 27<sup>th</sup> February 2013, the 2<sup>nd</sup> Respondent's officers descended on his office at the Ministry of Foreign Affairs in the company of members of the press following which, he was arrested. He contends that the arrest was carried out in a cruel and degrading manner thus exposing him to humiliation and undignified treatment contrary to his right to dignity under *the Constitution*.
7. He accuses officers of the 2<sup>nd</sup> Respondent of having convened a press conference immediately after his arrest to publicize it (the arrest) and allege that he was corrupt. It is his contention that this action by the 2<sup>nd</sup> Respondent's officers was meant to humiliate him further and portray him as a corrupt civil servant.
8. The Petitioner contends that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents subsequently arraigned him in court on 28<sup>th</sup> February 2013 to face corruption charges. He contends that this action violated his right to fair administrative action since the charges leveled against him were unfounded.
9. The Petitioner contends that he promptly applied to the High Court to stop the malicious process but the Respondents actively resisted the request. As a consequence, he was forced to undergo the criminal trial.
10. The Petitioner contends that despite the publicity that the Respondents gave to the trial, they failed to present cogent evidence against him. As a result, the criminal case against him collapsed for want of evidence.
11. The Petitioner contends that after the criminal charge collapsed, the 3<sup>rd</sup> Respondent's officer sensationally accused him and the court of having orchestrated the collapse of the case but later withdrew the accusations with an apology. According to him, these accusations further demonstrated the malicious intent with which the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had instituted the trial against him.
12. The Petitioner avers that the actions by the Respondents violated his rights under *the Constitution*. He contends that his rights to: fair administrative action; freedom from degrading treatment; equal protection of the law; and freedom from torture were violated.
13. The Petitioner contends that as a result of his prosecution, he was forced to step aside from his job before he eventually lost it. As a result, he was deprived of his right to earn remuneration up to his retirement age. As such, he argues that his right to fair labour practice was violated.
14. The 1<sup>st</sup> Respondent filed an affidavit dated 28<sup>th</sup> February 2024 in response to the Petition. This Respondent confirms that the Petitioner joined the civil service in 1989. It contends that absent the events which led to the Petitioner's early exit from employment, he would have worked up to mid-April 2023, his anticipated retirement age.
15. The 1<sup>st</sup> Respondent contends that the Petitioner was arrested by officers of the 2<sup>nd</sup> Respondent from his office and subsequently charged with corruption offenses on 27<sup>th</sup> February 2013. It contends that the Petitioner was however acquitted of the charges on 30<sup>th</sup> March 2016.
16. The 1<sup>st</sup> Respondent contends that after the Petitioner was acquitted of the criminal charges, he was retired from the civil service with effect from 1<sup>st</sup> July 2013. The 1<sup>st</sup> Respondent avers that the parties (1<sup>st</sup> Respondent and Petitioner) agreed that the Petitioner be paid his remuneration for the duration that he underwent the criminal trial. It contends that this payment was later actualized.



17. The 1<sup>st</sup> Respondent contends that the Petitioner was retired due to reorganization in Government which resulted in the abolition of his position. It contends that the Petitioner was paid: salary up to 30<sup>th</sup> June 2013; three months' salary in lieu of notice; payment in lieu of accrued leave; lump sum golden handshake; and pension benefits as his exit package.
18. In the premises, the 1<sup>st</sup> Respondent contends that it discharged its contractual obligations to the Petitioner. Further, it contends that the Petitioner lawfully retired from public service as from 1<sup>st</sup> July 2013. As such, it avers that his claim for salary until his retirement is unfounded.
19. Although the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed defenses to the action, the case against them was subsequently struck out through this court's ruling dated 19<sup>th</sup> October 2023. In the ruling, the court held that it did not have jurisdiction to entertain the Petitioner's claim against these two Respondents as there was no employment relation between him and the two. Consequently, this decision will be confined to the dispute between the Petitioner and the 1<sup>st</sup> Respondent.

### Issues for Determination

20. After evaluating the pleadings and affidavit evidence on record, I am of the opinion that the following are the issues for determination:-
  - a. Whether the 1<sup>st</sup> Respondent is liable to the Petitioner for the events that led to his prosecution in respect of a charge of corruption.
  - b. Whether the Respondent violated the rights of the Petitioner as alleged.
  - c. Whether the Petitioner is entitled to the reliefs that he seeks from the 1<sup>st</sup> Respondent.
21. The evidence on record shows that the Petitioner's tribulations were triggered by the controversy that surrounded the decision to purchase premises to house Kenya's Embassy in Japan. It would appear that the government suspected that the transaction was tainted with corruption and that the Petitioner had a hand in it.
22. The evidence shows that as a result of the foregoing, the 2<sup>nd</sup> Respondent instituted investigations in the process. It is these investigations that resulted in the decision to prosecute the Petitioner with an offense of corruption.
23. The 2<sup>nd</sup> Respondent is an independent agency established by an Act of Parliament in line with a constitutional edict under article 79 of *the Constitution* 2010. Specifically, it (the 2<sup>nd</sup> Respondent) is a creature of section 3 of the *Ethics and Anti-Corruption Commission Act* Cap 7H Laws of Kenya.
24. The 2<sup>nd</sup> Respondent is tasked with a broad mandate to fight the vice of corruption in Kenya. Pursuant to this mandate, the 2<sup>nd</sup> Respondent has powers to investigate suspected cases of corruption and recommend their prosecution to the 3<sup>rd</sup> Respondent. This power is specifically donated to the 2<sup>nd</sup> Respondent by section 11 (1) (d) of *Ethics and Anti-Corruption Commission Act*.
25. In line with this mandate, the 2<sup>nd</sup> Respondent opened investigations into the transaction relating to the Embassy premises for Kenya in Japan. It is therefore apparent that the 2<sup>nd</sup> Respondent acted within its mandate in this respect. It is also apparent that in recommending to the 3<sup>rd</sup> Respondent the prosecution of the Petitioner alongside other individuals, the 2<sup>nd</sup> Respondent was merely invoking the aforesaid powers.
26. Section 62 the Anti-Corruption and Economic Crimes Act Cap 65 Laws of Kenya directs the suspension from office of a public or state officer who has been charged with a corruption offense.



- Such officer is to remain on half pay during the currency of the criminal case. As such, once the 2<sup>nd</sup> Respondent causes the charging of a suspect with an economic crime, it is entitled to ask the suspect's employer to suspend him from service if the suspect is a public or state officer.
27. The 1<sup>st</sup> Respondent has been sued in its capacity as the legal representative of the Government of Kenya which was the employer of the Petitioner. The question to grapple with is whether the Government of Kenya, acting as the Petitioner's employer, had a hand in the decision to charge the Petitioner and require him to step aside from his employment.
  28. The answer to this question is in the negative. The decision to arrest and recommend the prosecution of the Petitioner was by the 2<sup>nd</sup> Respondent whilst discharging its constitutional and statutory mandate. As such, the 1<sup>st</sup> Respondent cannot be held liable for the omissions or commissions of the 2<sup>nd</sup> Respondent in this respect and which may have infringed the Petitioner's constitutional rights.
  29. The 3<sup>rd</sup> Respondent is established as an independent office under article 157 of *the Constitution*. It has power to institute criminal proceedings against any person. Whilst exercising this power, the 3<sup>rd</sup> Respondent is not subject to the directions of or control by third parties.
  30. As observed earlier, the 2<sup>nd</sup> Respondent may recommend to the 3<sup>rd</sup> Respondent a matter for prosecution. Once the recommendation is received, it is up to the 3<sup>rd</sup> Respondent to determine whether to charge a suspect. As such, once the 2<sup>nd</sup> Respondent recommended to the 3<sup>rd</sup> Respondent the need to prosecute the Petitioner, the ultimate decision whether to charge the Petitioner lay with the 3<sup>rd</sup> Respondent.
  31. The record shows that the 3<sup>rd</sup> Respondent indeed preferred charges against the Petitioner. This having been the decision of the 3<sup>rd</sup> Respondent, the 1<sup>st</sup> Respondent, in its capacity as the legal representative of the Petitioner's employer, cannot bear responsibility for the omissions and commissions of the 3<sup>rd</sup> Respondent which may have impacted on the Petitioner's rights.
  32. In effect, the 1<sup>st</sup> Respondent's principal, acting as the Petitioner's employer, did not orchestrate the events that are alleged to have resulted in violation of the rights of the latter. These acts were executed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents whilst purportedly discharging their constitutional and statutory mandates. As such, any action regarding infringement of the Petitioner's aforesaid rights ought to have been brought against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
  33. However, such action could only have been presented before the High Court exercising its constitutional jurisdiction to protect and uphold the Bill of Rights. It did not lie with the Employment and Labour Relations Court as there was no employment or labour relation between the Petitioner and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
  34. As indicated earlier, section 62 of the *Anti-Corruption and Economic Crimes Act* requires a public or state officer who is facing a charge of economic crime to step aside. Therefore, it cannot be contended that the 1<sup>st</sup> Respondent occasioned the stepping aside of the Petitioner and the resultant loss of half of his salary. This eventuality was dictated by law.
  35. I do not understand the Petitioner to be challenging the Government's decision to retire him from public service. Indeed, his Petition does not delve into this subject. That being the case, it is not open to the court to open up this issue and purport to question the propriety of the retirement.
  36. The record shows that the 1<sup>st</sup> Respondent's principal, the Government of Kenya, paid the Petitioner his withheld salary once the charges against him were dropped. The record further shows that the Petitioner was subsequently retired following abolition of his office. As indicated earlier, the Petitioner



does not challenge the legitimacy of the 1<sup>st</sup> Respondent's principal to retire him from service. Indeed, the Petition does not speak to this issue.

37. Having been paid his back salary, the Petitioner cannot seek to recover the same amount through these proceedings. As such, the prayer for arrears of salary is not well founded.
38. Having been retired from the civil service and having not challenged the decision to retire him in this Petition, the Petitioner cannot legitimately seek to be paid salary until his statutory retirement age. This would perhaps have been an issue for consideration if he had challenged the decision to retire him. As such, the claim is not well founded.

**Determination**

39. In the premises, I arrive at the conclusion that the Petitioner's case against the 1<sup>st</sup> Respondent is without merit.
40. Accordingly, it is dismissed.
41. Each party shall bear own costs.

**DATED, SIGNED AND DELIVERED ON THE 19<sup>TH</sup> DAY OF SEPTEMBER, 2024**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

..... for the Petitioner

.....for the 1<sup>st</sup> Respondent

**ORDER**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

