



Rasugu v Kisii University & another; Kisii University Staff Disciplinary Committee (Interested Party) (Petition E017 of 2023) [2024] KEELRC 2208 (KLR) (19 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2208 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E017 OF 2023
CN BAARI, J
SEPTEMBER 19, 2024
IN THE MATTER OF THE CONTRAVENTION OF THE
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
41, 47, 48, AND 50 OF THE CONSTITUTION OF THE
REPUBLIC OF KENYA, 2010
AND
IN THE MATTER OF THE COLLECTIVE BARGAINING
AGREEMENT
BETWEEN KISII UNIVERSITY COLLEGE AND THE KENYA
UNIVERSITIES STAFF UNION
AND
IN THE MATTER OF THE KISII UNIVERSITY STATUTES

BETWEEN

DANIEL RASUGU PETITIONER

AND

KISII UNIVERSITY 1ST RESPONDENT

KISII UNIVERSITY MANAGEMENT BOARD 2ND RESPONDENT

AND

KISII UNIVERSITY STAFF DISCIPLINARY COMMITTEE INTERESTED PARTY



JUDGMENT

1. The Petitioner's petition is dated 19th June, 2023, wherein, he seeks the following reliefs:
 - i. A declaration that by their letter dated 26th July 2022 overturning the finding and recommendation of the Interested Party to pardon the Petitioner, the 2nd Respondent usurped the roles and powers of the Interested Party and acted ultra vires;
 - ii. A declaration that the termination of the Petitioner was unlawful;
 - iii. A judicial review order of a certiorari to remove into the Employment & Labour Relations Court and quash the termination letter by the 2nd Respondent to the Petitioner dated 26th July 2022;
 - iv. An order of mandamus to compel the 1st Respondent to reinstate the Petitioner back to his former position as a driver without loss of benefits;
 - v. General damages for unlawful termination to be awarded to the Petitioner made up as follows; (Ksh. 66, 718 x 12 months = Ksh. 800, 616 /-).
 - vi. Costs of the petition; and
 - vii. Any other orders that the Honourable Court may deem just and fit to grant.
2. The Respondents and the Interested Party lodged a reply to petition dated 24th July 2023 wherein, they opposed grant of the prayers sought in the petition
3. The matter was referred to court annexed mediation at the request of the parties, but mediation did not yield results resulting in the matter being fixed for hearing.
4. Parties agreed to dispose off the petition by way of written submissions. Submissions were filed for both parties.

The Petitioner's Case

5. It is the Petitioner's case that he was employed by the 1st Respondent on 7th August, 2009 as a driver earning a gross salary of Kshs. 66, 718 / = per month.
6. The Petitioner avers that his terms of service were governed by his letter of appointment, the [Employment Act](#) and the Kisii University Statutes as well as the Collective Bargaining Agreement between the Respondents and the Petitioner's union known as Kenya Universities Staff Union, which among other provisions, was with respect to the procedure governing disciplinary process of all staff of the 1st Respondent which is undertaken by the Interested Party and whose findings and recommendations are endorsed by the 2nd Respondent without alterations.
7. The Petitioner states that by a show cause letter dated 13th April, 2022, the 1st Respondent accused the Petitioner of a raft of allegations relating to failure by the Petitioner to deliver the Respondent's motor vehicle Reg No. KCE 196D for service in time as directed, but proceeded to use the motor vehicle for personal use.



8. The Petitioner states that he did respond to the show cause letter vide a letter dated 27th April, 2022, and that on 25th May, 2022, the 1st Respondent invited the Petitioner to appear before the Interested Party for a disciplinary hearing scheduled for 9th June, 2022.
9. The Petitioner further states that he did comply and attended the disciplinary session where he was charged with two offences and for which he pleaded guilty to, and proceeded to mitigate for leniency.
10. It is the Petitioner's position that at the conclusion of the disciplinary process, the Interested Party pardoned the Petitioner, but with a warning not to repeat the mistake again.
11. The Petitioner states that on 18th July, 2022, the Interested Party's findings and recommendations were tabled before the 2nd Respondent for adoption as provided for under the Kisii University Statutes. He states further that the 2nd Respondent by a letter to the Petitioner dated 26th July, 2022, overturned the Interested Party's decision to pardon the Petitioner and, in its place, resolved to summarily terminate the services of the Petitioner without a valid reason.
12. That the Petitioner's complaint herein, is that the 2nd Respondent usurped the powers of the Interested Party and acted ultra vires by terminating his services leading him to suffer loss of employment.
13. The Petitioner avers that the Respondents are in violation of Articles 41, 47, 48, and 50, of *the Constitution* of Kenya, the *Fair Administrative Action Act*, the *Employment Act* and Kisii University Statutes. He states further that the Respondents are in breach of the general provisions of the negotiated CBAs in their handling of this matter.
14. The Petitioner states that Statute XXII of the Kisii University Statutes, 2020 provides for defined roles between the 2nd Respondent and the Interested Party. That the Interested Party is the one in charge of the disciplinary process and its outcome, while the 2nd Respondent's mandate is strictly to endorse the findings of the Interested Party.

The Respondents' and the Interested Party's Case

15. In their response to petition dated 24th July, 2023, the Respondents state that on 24th January, 2022, the Petitioner was instructed to drive motor vehicle Reg. No. KCE196D from Migori Campus to Kisumu for a normal service. They state further that the Petitioner failed to deliver the vehicle for service as instructed.
16. It is their case that on 26th January, 2022, the 1st Respondent's (Acting) Transport Manager, wrote to the Petitioner demanding that he explains the whereabouts of the said vehicle. They state that by a letter dated 2nd February, 2022, the Petitioner casually and unapologetically stated that the vehicle had been involved in an accident.
17. They state that following the response given by the Petitioner, the 1st Respondent caused an investigation to be instituted into the circumstances of the disappearance of the subject vehicle culminating in a preliminary report which established that the vehicle was involved in an accident at about 8.00 pm, and that the Petitioner was assisted by well-wishers to get the vehicle to a garage within Kisii town.
18. That the investigation further established that after repairs the said vehicle was delivered to Kisumu for service on 27th January, 2022, a period of three (3) days later from when the vehicle ought to have been delivered for service.
19. The Respondents state that a show cause dated 13th April, 2022 was served upon the Petitioner calling upon him to respond to the allegations of failing to drive the vehicle to the designated point in time,



- using the said vehicle for personal benefit without authority of the 1st Respondent, failing to report an accident, secretly repairing the said vehicle after an unreported accident and disappearing with the vehicle for three (3) days without the knowledge of the 1st Respondent.
20. They state that by letter dated 12th May, 2022 the Petitioner was notified of the falsity in his response to the show cause and notified to await further communication from the 1st Respondent.
 21. That the Petitioner was invited to appear before the Interested Party to answer to two offences the particulars of which were: -
 - a. That the Petitioner was on 24th January, 2022 at 9.00 am instructed to drive the said vehicle from Migori Campus to Kisii University but disappeared with the same for two days and converted the same to personal use.
 - b. The Petitioner between 24th and 27th January, 2022, whilst using the vehicle for personal use got involved in an accident and failed and/or refused to report the said accident to his superiors and instead went ahead to repair the same without authority.
 22. It is the Respondents' case that the Petitioner was heard by the Interested Party and that he pleaded guilty to the charges. They state further that the Interested Party recommended that the Petitioner be served with a strong warning letter, recommendations which were placed before the 2nd Respondent for final decision.
 23. They aver that the 2nd Respondent at its meeting of 18th July, 2022 considered the recommendations of the Interested Party and upon review of the charges against the Petitioner, considered that the same amounted to gross misconduct and determined to summarily dismiss the Petitioner culminating in a letter dated 26th July, 2022 summarily terminating the Petitioner
 24. It is the Respondents' position that the Interested Party is established as a Committee of the 2nd Respondent pursuant to Statute XXII (5)(d) of the Kisii University Statutes, 2020 and therefore subservient to the direction and authority of the 2nd Respondent.
 25. It is their case that the Interested Party's mandate extends only to making recommendations to the 2nd Respondent for its consideration as the business and decisions of the 2nd Respondent are governed by Statute XXII paragraph (9) which provides for voting.
 26. That the 2nd Respondent is not bound by recommendations of the Interested Party in so far as the 2nd Respondent is the body charged with staff management under Statute.
 27. That the Petitioner's disciplinary record did not support the recommendations of the Interested Party in so far as the offences charged were in the nature of gross misconduct warranting mandatory summary dismissal. Further, the Petitioner had been involved in several incidents where he made purchases of fuel and lubricants worth Kshs.58,852.10 which were unsupported which meant that the 1st Respondent had lost the said monies on account of which the Petitioner was surcharged.
 28. That the Petitioner lodged an appeal against the dismissal on humanitarian grounds which appeal was reviewed and disallowed.
 29. They aver that the relations between them and the Petitioner is irretrievably broken on account of which the 1st Respondent is unable to take back the Petitioner as its employee. They state that the summary termination of the Petitioner was procedurally and substantively sound
 30. The Respondents and the Interested Party contend that the Petition before court ought to be dismissed with cost.



The Petitioner's Submissions

31. It is the Petitioner's submission that the 2nd Respondent had no power under statute and law to overturn the Interested Party's decision and that by their decision contained in the letter of 26th August, 2022 to dare overturn the verdict pardoning the Petitioner, the 2nd Respondent usurped the roles of the Interested Party and acted ultra-vires, thus committed an injustice to the Petitioner.
32. It is submitted that the Petitioner had a right to appear before the 2nd Respondent to argue his case, which situation will be like an appeal before the 2nd Respondent returned its verdict on whether or not to overturn the decision of the Interested Party. He submits that the right to be heard is both a constitutional and procedural right.
33. The Petitioner further submits that the decision by the 2nd Respondent to terminate his services without affording him a hearing was unconstitutional and unfair and contrary to Section 45 of the Act and Article 47(1) of *the Constitution* of Kenya on fair administrative action.

The Respondents' and Interested Party's Submissions

34. The Respondents submit that only the 1st Respondent can be sued and that the petition as taken out against the 2nd Respondent and Interested Party is misguided. They submit further that whereas the issue was raised whether the 1st Respondent and the Interested Party can be sued; the Petitioner did not address the same in his submissions with the result that the issue ought to be determined in favour of the 2nd Respondent and the Interested Party.
35. The Respondents submit that the enumeration of provisions of *the Constitution* is insufficient to establish a violation of *the Constitution* as every violation of the law is invariably a violation of *the constitution*. It is their further submission that the Petitioner has not demonstrated how this honourable court must resolve issues before it by interpretation of the cited provisions of *the Constitution*.
36. It is their submission that issues before court relate to breach of a contract of employment where the Petitioner is among others, seeking specific performance by his insistence on being reinstated. They placed reliance in the case of *John Harun Mwau vs Peter Gastrol & 3 Others (2014) eKLR* for the holding that:

“Courts will not normally consider a constitutional question unless the existence of a remedy is dependent on it. It is an established practice that where a matter can be disposed of without recourse to *the constitution, the constitution* should not be involved at all.”
37. It is submitted for the Respondents that what is to be interpreted are the Statutes of the 1st Respondent and Human Resource Manual – precisely whether within the provisions of the Statutes and Human Resource Manual, the 2nd Respondent had authority to arrive at a determination which differed from a recommendation of the Interested Party.
38. The Respondents submit that the institution of the petition before this honourable court was misguided.
39. It is submitted that where there are mechanisms provided by an employer to address a grievance, those mechanisms need to be exhausted before recourse to a court of law. They submit that having failed to lodge an appeal to the Council within thirty (30) days per the Human Resource Manual, the Petitioner lost the right to contest the decision terminating him, and must be deemed as having been satisfied with



the decision to terminate his services and the loss should lie where it falls. They had reliance in Dishon B. Ongondi v Kebirigo Tea Factory Co. Ltd & Another [2020] eKLR to support this assertion.

40. On whether the 2nd Respondent usurped the powers of the Interested Party and thereby acted ultra vires, the Respondents submit that under Statute XXII(4)(e), the Disciplinary Committee is established as a Committee of the 2nd Respondent.
41. It is the Respondents' submission that if at all the recommendation of the committee was equivalent to a determination, there would have been no need of requiring that the recommendations of the Interested Party be tabled for final determination.
42. It is further submitted that there is a clear dichotomy between the powers of the Committee and those of the 2nd Respondent – the Committee make recommendations, the 2nd Respondent makes final decision. That the use of the words “recommendation and final determination of decision” is deliberate to delineate what each organ does, otherwise the need to use the said words would not have arisen.
43. The Respondents submit that the recommendation of the disciplinary committee was not binding, but left the final decision on the Petitioner's employment with the 2nd Respondent.
44. It is the Respondents' submission that the termination of the Petitioner was consequent upon a process where the Petitioner was served with a show cause letter and a charge sheet outlining offences he had to answer to, a hearing, a confession of guilt and ultimately a verdict. That the Petitioner was given an opportunity to lodge an appeal to the Council of the 1st Respondent but he did not lodge any appeal.
45. They submit that both procedural and substantive fairness were indeed attained in the process leading to the dismissal of the Petitioner.
46. It is their submission that re-engagement of the Petitioner would not be an appropriate remedy on the premise that the Petitioner had a previous record of dishonest dealings which had occasioned the 1st Respondent losses.
47. The Respondents finally submit that the petition before court is ill founded, is misconceived and is an abuse of due process. they deny that any constitutional right of the Petitioner, as pleaded or otherwise was breached, and that upholding the petition will amount to rewarding gross misconduct on the part of the Petitioner.

Analysis and Determination

48. I have considered the petition, the reply by the Respondents and the Interested Party, together with the rival submissions. The following issues present for determination:
 - i. Whether the 2nd Respondent and the Interested Party have capacity to be sued;
 - ii. Whether the petition as drawn violates the doctrine of Constitutional avoidance and if not;
 - iii. Whether the Petitioner is entitled to the reliefs sought.

Whether the 2nd Respondent and the Interested Party have capacity to be sued

49. The 1st Respondent's contention is that the 2nd Respondent and the Interested Party herein, have no capacity to be sued and have thus been wrongly joined to this suit. It is its assertion that Interested Party is established as one of the committee of the 2nd Respondent under Statute XXII (5)(e), whose sole role is to enable the 2nd Respondent to carry out its mandate, which includes efficient management of the human, physical and financial resources of the university.



50. The Petitioner did not at any point, either through its pleadings or subsequent submissions, controvert this position.
51. Indeed, the Kisii University Statutes establishes both the 2nd Respondent and the Interested Party as entities of the university and spells out their respective mandate. The Act then proceeds to grant the 1st Respondent power to sue and be sued.
52. As correctly submitted by the Respondents, nowhere in the university Charter or the Statutes is it indicated that the 2nd Respondent or the Interested Party can be sued for anything they do, as going by their specific function, they act purely on behalf of the 1st Respondent which then by dint of that delegation, shoulders any resultant legal obligation and actions.
53. In light of the foregoing, I return that the 2nd Respondent and the Interested Party have no capacity to be sued and have been wrongly joined to these proceedings.

Whether the petition as drawn violates the doctrine of Constitutional avoidance

54. The Respondents contend that the enumeration of provisions of *the Constitution* is insufficient to establish a violation of *the Constitution* for reason that every violation of the law is invariably a violation of *the Constitution*.
55. It is their assertion that the issues before this court relate to breach of a contract of employment where the Petitioner, is among others, seeking specific performance by his insistence on being reinstated, and which in their view should have been sought through an ordinary claim.
56. Indeed, it is trite law that where legislation has been enacted to give effect to a constitutional right, it is not permissible to base a cause of action directly on *the Constitution*.
57. The Supreme Court of Kenya in the case of Communication Commission of Kenya & Others v Royal Media Services Limited & 5 others [2014] eKLR opined thus on Constitutional avoidance: -

“The appellants in this case are seeking to invoke ‘the principle of avoidance’; also known as ‘constitutional avoidance’. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.”
58. The Petitioner by his pleadings seeks the interpretation of the 1st Respondent’s Statutes and Human Resources Manual on whether the 2nd Respondent had authority to arrive at a determination different from a recommendation of the Interested Party. This in all fairness cannot be the subject of a constitutional petition.
59. The Court of appeal in Sumayya Athmani Hassan vs Paul Masinde Simidi & another [2019] eKLR, stated;

“The article 41 rights are enacted in the *Employment Act* and the *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*.



We adopt and uphold the general principle in the persuasive authority in Barbara De Klerk [supra] that where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. That principle has reinforced by the Supreme Court in Communications Commission case [supra]....”

60. It is also clear that the reliefs sought by Petitioner under the petition, include a declaration that his termination was unlawful, compensation for unfair termination and salary arrears amongst others. These are all clearly remedies provided for under the Employment Act, 2007, and which should have, as correctly submitted by the Respondents, been sought under an ordinary claim under statute and not by way of a constitutional petition.
61. In the end, I reach the conclusion that there are no constitutional issues raised in this dispute, and which renders the petition incompetent and is for striking out.
62. The other issues subject herein, fall by the way side.
63. The petition is thus struck out with no orders on costs.
64. Judgment of the Court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 19TH DAY OF SEPTEMBER, 2024.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Omondi h/b for Ms. Akinyi for the Petitioner

Ms. Kebungo h/b for Mr. Nyamurungi for the Respondents & I. Party

Ms. Anjeline - C/A

