



Kubasu v Kenya Electricity Transmission Company Limited & 2 others (Petition E143 of 2024) [2024] KEELRC 13243 (KLR) (27 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 13243 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E143 OF 2024
B ONGAYA, J
NOVEMBER 27, 2024**

BETWEEN

PRISCA KUBASU PETITIONER

AND

**KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED 1ST
RESPONDENT**

**BOARD OF DIRECTORS OF KENYA ELECTRICITY TRANSMISSION
COMPANY LIMITED 2ND RESPONDENT**

**MANAGING DIRECTOR OR ACCOUNTING OFFICER OF KENYA
ELECTRICITY TRANSMISSION COMPANY LIMITED 3RD RESPONDENT**

JUDGMENT

1. The petitioner filed the petition on 25.09.2024 through Sikuta & Associates Advocates. The petitioner prayed for reliefs as follows:
 - a. A declaration that the summary dismissal of the petitioner was irregular, unprocedural, illegal, unconstitutional hence null and void ab initio.
 - b. An order directing the respondents to unconditionally reinstate the petitioner to her employment services and former position or equally suitable position with all her back salary, allowances, benefits and any other legal dues accrued to her without any loss of benefits or seniority and without any conditionality.
 - c. An order directing the respondents to pay the petitioner any pending salaries, allowances and benefits accrued to her while on suspension.
 - d. Compensation for unlawful termination Kshs 12 x 490,000 = 4,880,000/=.



- e. One month salary in lieu of notice Kshs 490,000/=.
 - f. An Order for the petitioner to be adequately compensated for time lost out of employment.
 - g. General damages for mental and emotional stress caused by the respondents.
 - h. In alternative to prayer 2 above and without prejudice to any of the foregoing prayers, the respondents be ordered to pay the petitioner all her salaries, all benefits any other legal dues for the remainder of her term of service from the day of unlawful and wrongful termination of her employment which remaining term is calculated at Seven (7) years from the date of the unlawful termination when the petitioner will have attained the age of Sixty (60) years for lawful retirement from public service.
 - i. Costs of this petition be borne by the respondents.
 - j. Interest on monetary reliefs above.
2. The petitioner's case is based upon the following pleaded facts:
- a. That on 2nd September 2024, the respondents resolved to summarily terminate the petitioner from employment of the 1st respondent purportedly over the procurement and award of tender for the 90/110 MVA and 18/23 MVA(Ortumand Kitale) transformers to site, contrary to paragraphs 11.1.1, 11.3, 11.4, 11.5(a),(f) &(h), 11.9.14to 11.9.17, 11.10 and 11.13.1 of the 1st respondent's Human Resource Policy and Procedures Manual.
 - b. That while the petitioner's colleagues and who were part of the procurement and tender evaluation team were exonerated from any wrongdoing, the petitioner was summarily dismissed by the respondents contrary to law and procedures hence the summary dismissal remains illegal, unreasonable, irregular, procedurally unfair and without foundation or basis.
 - c. That on 20th to 23rd June 2023 while acting for Senior Manager, Supply Chain Management the petitioner was presented with a report for registration or prequalification of firms for transportation of transformers from Mombasa to Ortumand Kitale. As a routine procedure for continuous prequalification process, all firms that seek prequalification through the 1st respondent's system are taken through this process, therefore she made a request to the 3rd respondent seeking for approval through a professional opinion dated 20th June 2023 which the 3rd respondent approved.
 - d. That the request was for Six firms to be approved for prequalification. The request did not in any way bar the use of previously prequalified firms from participating nor including any other firms.
 - e. That consequently, the acting period ended and the petitioner did not interact with the process until when she received a show cause letter for gross misconduct dated 8th December 2023.
 - f. That at the same time, the petitioner received an Internal Memo from one Godfrey Imanane, Manager Security Services dated 5th December 2023 in which she was to respond by 7th December 2023 and since she was out of office on official duty, upon return to the office, she requested to be allowed more time to respond to the letter vide request dated 14th December 2023 which was accepted and approved by the 3rd respondent on 14th December 2023. That Mr. Godfrey Imanane is a Manager who was at the same level as the petitioner and was therefore not qualified to carry out investigations against the petitioner.



- g. That the petitioner responded to the said show cause letter and memo, which were received on 21st December 2023.
- h. That the Petitioner was invited to appear before the 2nd respondent with regard to the procurement for the transportation of the said transformers on 2nd May 2024 vide letter dated 24th April 2024 which date was later rescheduled to 13th May 2024 vide the letter dated 30th April 2024.
- i. That the petitioner appeared alone before the 2nd respondent on 13th May 2024 at about 5.00pm and ably responded to the issues raised in the show-cause letter but despite demonstrating her innocence and indicating that she acted within the professional boundaries, the respondents seemed to have made a predetermined decision and her appearance was simply a formality.
- j. That consequently on 31st May 2024, the petitioner was issued with a Suspension Letter dated 28th May 2024 suspending her for undefined period and while still thinking through the contents of the same, she was issued another letter dated 6th June 2024 to notify her of the probable delay in the disciplinary process beyond the 6months as provided in the 1st respondent's HR Manual. Even when the disciplinary process prior suspension had already exceeded the 6 months period as set out in the HR Manual.
- k. That the petitioner committed no wrongdoing and in fact the 3rd respondent as the accounting officer approved her professional opinion, awarded the tender to the firm that transported the transformers and the 3rd respondent was in fact seen in Nairobi happily flagging off the transformers as they were being transported to their respective sites namely Ortum and Kitale.
- l. That the transformer for Ortum arrived safely and was installed and now functional but the one for Kitale the truck transporting it was involved in an accident there by damaging it.
- m. That the said accident then formed the basis for the petitioner's woes even when she had professionally discharged her mandate and the transportation was purely now in the hands of the transporters who had been lawfully procured.
- n. That the petitioner is being mistreated and subjected to emotional distress and unfair labour practices for something that was not under her control, as she was neither the driver nor the transporter of the said transformer and she would not have been summarily dismissed had all the transformers arrived and installed safely; which arrival and installation is outside the purview of procurement.
- o. That the 3rd respondent being the accounting officer of the 1st respondent and having executed the letter of award of tender and the contractor having accepted the same and having provided him with a professional opinion in accordance with the public procurement law which he approved and in fact the 3rd respondent having examined and also inspected the said transformers upon their arrival in Nairobi and okayed their onward transportation to their respective destinations confirms the petitioner's innocence and professional execution of her work.
- p. That the illegal summary dismissal of the petitioner was a planned and predetermined decision meant to make the petitioner a sacrificial lamb to cover up for any inefficiencies of the 3rd respondent and other responsible parties hence the respondents' deliberate effort to overlook and flout the Human Resource Policy and Procedures Manual by taking the most abhorrent decision of illegal and unconstitutional summary dismissal of the petitioner.



- q. That the respondents have since appointed someone to act in the petitioner's capacity hence the petitioner is apprehensive that given her summary dismissal, she may be locked out of the seat of justice and her substantive position taken over.
 - r. That before the summary dismissal, the petitioner had been indefinitely suspended by the respondents leading to her approaching the Employment Court vide Petition No.E094 of 2024 which is still pending in Court before Hon. Justice Nduma Nderi for confirmation of compliance in filing of submissions.
 - s. That while the said case was coming up for mention on 1st October 2024 to confirm compliance in filing submissions, and while she was still awaiting the outcome as to the letter of 6th June 2024, the respondents deliberately decided to summarily terminate her contract on 2nd September 2024 before determination of the said the case.
 - t. That unless the illegal action to summarily dismiss the petitioner herein is stopped by the Honourable Court, the petitioner will be greatly prejudiced particularly given the fact that the petitioner has only about 6 years to retirement hence it is difficult to secure another employment.
 - u. That the petitioner's summary dismissal by the respondents offend the rules of natural justice, flouts the 1st respondent's Human Resources Policy and Procedures Manual, falls afoul of the constitutional provisions on fair labour practices, relevant laws and regulations fundamentally rendering the entire process illegal, unconstitutional, unlawful hence null and void *ab initio*.
 - v. That the petitioner was dismissed without being paid balance of his salary and other benefits which had accrued to her while on suspension. She was not offered terminal dues and certificate of service as required by law.
 - w. That all the members of the procurement and tender evaluation team have since been exonerated by the respondents but the petitioner who only interacted with the impugned procurement process briefly in an acting capacity, has been singled out and subjected to the most abhorrent, unconstitutional, illegal and despicable summary dismissal.
 - x. That the entire process culminating and leading to summary dismissal of the petitioner including the suspension is illegal as even the mandate to hear and determine the suspension of the petitioner lies with the 1st respondent's HRAC (Human Resource and Advisory Committee) which never sat to make such deliberations.
3. The respondents filed the replying affidavit of Dr. Eng. John Mativo, MBS, the 1st respondent's Managing Director. It was sworn on 09.10.2024 and filed through Mwaniki Gachoka & Company Advocates. It was urged as follows:
- a. While the petitioner enumerated provisions of *the constitution* allegedly violated, there are no pleaded particulars to show with certainty the breaches of rights and freedoms as alleged. The dispute is a claim for unfair summary dismissal disguised as a constitutional petition.
 - b. The 1st respondent is a public body and the petitioner is a public officer per section 2 of the *Public Service Commission Act, 2017* and therefore the petitioner ought to have sought redress in the first instance regarding her summary dismissal with the Public Service Commission per section 74(1), (2) and (5) of the Act.
4. While the respondents have stated in the replying affidavit substantive material facts to oppose the petition, the Court considers that it is important to dispose the preliminary issues urged for the



respondents. The Court has considered the final submissions filed for the parties. The Court returns as follows:

- a. The Court has perused the submissions filed for the petitioner. They appear not to address the serious preliminary objections urged for the respondents. Instead, the petitioner simply moves to address and submit on the substantive issues alleged in the petition. The petitioner's affidavit in reply dated 24.10.2024 simply repeats allegation of violation of rights as earlier pleaded in the petition and per the supporting affidavit.
- b. The Court has reproduced the pleadings and the case as urged for the petitioner. The Court has as well reproduced the reliefs. As urged for the respondents, the claim is for unfair summary dismissal with attendant reliefs and nothing more. The mere enumeration of the provisions of the Bill of Rights and *the Constitution* without pleaded particulars of threatened or actual constitutional violations and failing to provide required evidence to establish the same makes the petition chained with the doctrine of constitutional avoidance. As submitted for the respondents the petitioner fails to plead by setting out with reasonable degree of precision that which the petitioner complains, the provision of *the Constitution* said to be infringed, and the manner the provisions are said to be infringed as was held in Anarita Karimi Njeru –Versus- Republic (1979) eKLR. The Court finds that the instant petition provides little or no particulars as to the allegations of the violation or threatened violation of the enumerated provisions of the Bill of Rights. The submissions made for the respondents are upheld in that regard and the claim as pleaded is truly and falls as an ordinary action for alleged unfair summary dismissal.
- c. Section 74 of the *Public Service Commission Act*, 2017 on appeals provides:
 1. Any person who is dissatisfied or affected by a decision made by an authorized officer or other authority in exercise or purported exercise of disciplinary control against any public officer under this Act may appeal to the Commission.
 2. An appeal under subsection (1) shall be made in writing within ninety days from the date of the decision appealed against:

Provided that the Commission may consider an appeal that was made out of time if, in the opinion of the Commission, the circumstances warrant such consideration.
 - (3) The Commission shall not entertain an appeal by a public officer or a representative of a public officer, in respect of a particular decision, more than once.
 - (4) Despite the right of appeal conferred on a public officer by this section, disciplinary action shall not be deferred or suspended pending the determination of the appeal.
 - (5) After considering an appeal, the Commission may —
 - (a) uphold the decision;
 - (b) set the decision aside;
 - (c) vary the decision as it considers to be just;
 - (d) give such directions as it may consider appropriate with respect to the decision;
 - (e) direct the refund, reinstatement of remuneration or release of any withheld payments due to the public officer as it considers to be just;



- (f) direct that disciplinary action be taken against any public officer who has failed to discharge a duty that was the public officer's responsibility to perform in relation to the disciplinary case and the concerned public body has suffered a loss; or,
 - (g) make any other appropriate decision in view of the circumstances of the case.
 - (6) Where the Commission sets aside a decision under subsection (5)(b), the public officer shall revert to the previous status held and receive the attendant benefits as though the decision set aside was never made.
 - d. Regulation 68 of the Public Service Commission Regulations provide for appeals and the applications for review against a disciplinary process or decision like in the instant case and as envisaged in sections 74 and 75 of the Act.
 - e. The Public Service Commission has since issued Public Service Commission (State Corporations and Public Universities) Disciplinary Appeals Procedures, 2024 that is an administrative guide to implementation of the appeals jurisdiction.
 - f. Thus, in absence of any other justification in the instant petition, the Court finds for the respondents that the instant proceedings were premature for want of exhaustion of the prescribed appeal or review procedure.
 - g. In view of the foregoing findings, the petition is liable to striking out. Considering the cause of action is not stale and the statutory procedure is still available, each party will bear own costs of the petition.
5. While making the foregoing findings, the Court has considered rule 56 of the Employment and Labour Relations Court (Procedure) Rules, 2024 which states:
- (1) The Court may at any time refer a matter to alternative dispute resolution.
 - (2) Parties in a proceeding may reach a consensus at any time before judgment is rendered and the parties shall file the consent within such period as the Court may prescribe.
 - (3) The Court shall record and adopt the consent reached by the parties as its own ruling or judgment in that matter.
 - (4) Where a matter is partially determined by virtue of a consent adopted by the Court, the issues that have not been resolved shall proceed before the judge hearing it.
 - (5) Where *the Constitution*, a written law, collective bargaining agreement, contract of service, policy, or other instrument provides for alternative dispute resolution mechanisms—
 - (a) a person being party to a dispute may file a suit and seek appropriate interlocutory relief pending exhaustion of such alternative dispute resolution mechanisms or pending determination of the suit;
 - (b) want of exhaustion of such alternative dispute resolution mechanisms shall not operate as a bar to a suit for application for interim orders or alleging unconstitutionality or unlawfulness of the action, omission, decision or other matter in dispute pending such exhaustion; and,
 - (c) a suit filed prior to exhaustion of such alternative dispute resolution mechanisms may be stayed and not struck out on account of such exhaustion.



6. The Court has found that the instant petition was chained by the doctrine of constitutional avoidance. Accordingly, it cannot be saved by way of being stayed as envisaged in the foregoing rule. The petitioner should be at liberty to file an appropriate ordinary suit and as well seek appeal within the statutory provisions.
7. Accordingly, the petition herein is determined with orders as follows:
 - a. The petition is hereby struck out for want of exhaustion of prescribed statutory appeal and for failing to meet the threshold for a proper constitutional petition.
 - b. The petitioner is at liberty to file the appeal to the Commission within 14 days from the date of this judgment and may file an ordinary action as envisaged in rule 56 of the Employment and Labour Relations Court (Procedure) Rules, 2024.
 - c. Each party to bear own costs of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 27TH NOVEMBER 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

