



**Wanyoike v Human Resource Management Professional Board
Examination Board (Employment and Labour Relations Petition
E183 of 2023) [2024] KEELRC 2781 (KLR) (8 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2781 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E183 OF 2023
AN MWAURE, J
NOVEMBER 8, 2024**

BETWEEN

JANE WANYOIKE PETITIONER

AND

**HUMAN RESOURCE MANAGEMENT PROFESSIONAL BOARD
EXAMINATION BOARD RESPONDENT**

JUDGMENT

1. The Petitioner filed an amended Petition dated 23rd May 2024.

Petitioner’s Case

2. The Petitioner avers that she was employed as Manager Examination since 2017 on permanent and pensionable terms. She also served as the acting Chief Executive Officer from 1st June 2018 to June 2020.
3. The Petitioner avers that she applied for the position of Chief Executive Officer when the position was advertised and the recruitment process was carried out but her application was not successful.
4. The Petitioner avers that she resumed back to the position of Manager Examination and she was later appointed as Manager Examination Administration on 27th September 2021 which she served diligently.
5. The Petitioner avers that on 31st March 2023, she was issued with a notice to show cause letter indicating that she had been suspended from employment on accusations of gross misconduct with regard to the released result slips suspected of exam malpractice and insubordination.



6. The Petitioner avers she received an invitation to a hearing vide a letter dated 2nd May 2023 which was scheduled on 12th May 2023 at the Respondent's office.
7. The Petitioner avers that she attended the hearing on 12th May 2023 but the Respondent violated her right to a fair hearing which led to her termination vide a letter dated 23rd May 2023.
8. The Petitioner avers that she was dissatisfied with the Respondent's board decision to terminate her employment and appealed vide a letter dated 12th July 2023 and the Board upheld its decision to terminate her.
9. The Petitioner avers that she appealed against the Respondent's Board decision to the Public Service Commission seeking reinstatement to her previous position of Manager Examination Administration and the appeal was settled down for hearing.
10. The Petitioner avers that in the course of awaiting the decision of the appeal from the Public Service Commission, the Respondent went ahead to advertise for her position in the Daily Nation Newspaper.
11. The Petitioner avers that on 7th March 2024, the Public Service Commission gave its verdict finding that she was wrongfully dismissed and ordered for her reinstatement.
12. The Petitioner avers that the Respondent applied for review which the Public Service Commission set aside their decision.
13. The Petitioner prays for:
 - a. A declaration that the Respondent breached her right to equality under Article 27, right to dignity under Article 28, right to freedom of security under Article 29, right to fair labour practices under Article 41, right to fair administrative action under Article 47 and Article to a fair hearing under Article 50 of *the Constitution* of Kenya, 2010
 - b. General damages for breach of the Petitioner's rights under *the Constitution* of Kenya, 2010
 - c. An order for the reinstatement of the Petitioner to the position of Manager Examinations Administration and for payment of all withheld salaries and allowances for the date of termination of the Petitioner being 23rd May 2023
 - d. The sum of Kshs.7,411,000 being salary, the Petitioner ought to have received as the Chief Executive Officer of the Respondent and in the alternative, the sum of Kshs.242,678 being the 10% acting allowance that was not paid during her tenor as the acting Chief Executive officer
 - e. Costs of the petition.

Respondent's replying affidavit

14. In opposition to the Petition, the Respondents filed their Replying Affidavit dated 1st August 2024.
15. The Respondent avers that the recruitment process for the position of Chief Executive Officer was competitive and done in accordance with the constitutional requirement of selection based on personal integrity, competence and suitability.
16. The Respondent avers that the Petitioner's designation did not amount to demotion as her designation is the immediate grade following that of the Chief Executive Officer.
17. The Respondent avers that the Petitioner was guilty of insubordination by breaching paragraphs 10.11, 10.14, and 10.27 of the Human Resource Policy and Procedure Manual (2021). The Petitioner



failed to comply with the Board's directive to withhold the results of 14 students suspected of involvement in examination malpractice. This failure is deemed a major offence and gross misconduct under paragraphs 11.1.6 and 11.1.7 of the Respondent's Human Resource Policy and Procedure Manual (2021) and section 44(4)(e) of the *Employment Act*.

18. The Respondent avers that the Petitioner was accorded a fair hearing by issuing her a notice to show cause, suspending and giving her an opportunity to defend herself at the hearing held on 12th May 2023.
19. The Respondent avers that the Petitioner was dissatisfied with the Board's decision dismissing her vide a letter dated 23rd May 2023 which she appealed and was later invited for the appeal hearing by appearing before the Board on 1st September 2023.
20. The Respondent avers that the Board accorded the Petitioner a fair hearing during the appeal and stated that she failed to prove her grounds of appeal as captured in her letter dated 12th July 2023.
21. The Respondent avers that the Petitioner is not entitled to the declaratory order, general and special damages, an order of reinstatement to the position of Manager Examination Administration and for payment of all withheld salaries and allowances from the date of termination and costs of the suit.
22. The Petition is canvassed by way of written submissions.

Petitioner's submissions

23. The Petitioner submitted that the Petition is valid due to alleged violations of her constitutional rights by the Respondent during her employment. The Respondent falsely claims that the Petitioner did not raise these issues with the Respondent's Board.
24. Additionally, the Petitioner submitted that the existence of this suit shows that the Respondent's Board is not the appropriate authority on human rights protection, as it lacks jurisdiction over constitutional rights violations. In a constitutional democracy, the courts are the ultimate guardians of *the Constitution*. The Petitioner relied on the cases of Sheria Mtaani Na Shadrack Wambui V Public Service Commission & 2 Others [2021] eKLR and International Centre for Insect Physiology and Ecology (ICPE) Vs Nancy Minaly [2018] eKLR in support of that proposition.
25. In the case of Willie Kipkoech Langat V County Public Service Board & 2 others [2022] eKLR the court stated as follows:

“Under Section 45 of the *Employment Act*, termination of an employee's contract is unfair if the employer fails to prove:-

 - a. That it was grounded on valid and fair reasons
 - b. A fair procedure was followed
26. The Petitioner submitted that the reasons for her dismissal were insubordination and gross misconduct in accordance with paragraphs 10.11, 10.14 and 10.27 of the Respondent's Human Resource policy and procedure (2021).
27. The Petitioner further submitted that the issues of insubordination and gross misconduct were not raised in her notice to show-cause letter dated 31st March 2023 and were not discussed during the disciplinary proceedings.



28. In *Spin Knit Limited V Benard Kiplangat Cheruiyot* [2022] eKLR the court held as follows with regard to the threshold of negligence as a cause of action against a party;

“...With regard to an action in negligence, it is stated in Halsbury’s Laws of England, 4th Edition at paragraph 662 at page 476 as follows with respect to what is required to be proved in an action such as the Petitioner’s: -

QUOTE{startQuote “}

The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established.”

29. In the case of *Edward Otsieka Opiayo V Insurance Regulatory* [2020] eKLR, the court cited the case of *Abraham Gumba V Kenya Medical Supplies Authority* [2014] eKLR where Justice Rika held that;

“Insubordination was defined by the Mississippi Supreme Court in the case of *Sims V. the Board of Trustees Holly Springs Municipal Separate District School*, 414 SO. 2d 431 [Miss. 1982], as “ a constant or continuing intentional refusal to obey direct or implied order reasonable in nature, and given by and with proper authority.“ Under the *Employment Act* 2007, both forms of insubordination are captured under Section 44 [4] [d] and [e]...” 44.

30. Section 44(4) (d) and (e) of the *Employment Act* provides grounds for summary dismissal as follows:

“ 44. an employee knowingly fails, or refuses, to obey a lawful and proper command
(4) which it was within the scope of his duty to obey, issued by his employer or a
(e) person placed in authority over him by his employer;”

31. The Petitioner submitted that insubordination involves specific elements: an order must be issued, and received, and then the employee must refuse to carry it out which was not the case. The Petitioner received a directive that she could not implement it on her own because she did not have access to the examination management system.

32. The Petitioner stated that she did everything within her power to communicate the instructions to the officer who did have access. Therefore, she did not refuse to follow the instructions, and her actions cannot be classified as insubordination. Additionally, the Respondent failed to properly address the charge and did not consider the necessary components of the accusation.

33. The Petitioner submitted that the due procedure was not followed. In the case of *Kenya Co-Operative Creameries V Sigei (Appeal E002 of 2022)* [2024] KEELRC 27 (KLR) (25 January 2024) (Judgment) the court held that employers must communicate the grounds for disciplinary action and provide all evidence to the employee. They should inform the employee of their rights to call witnesses and be accompanied by a co-worker or union representative. In this case, the employer failed to follow these procedures, neglecting to provide an audit report or inform the employee of their rights. Despite the employee’s long service and clean record, the employer did not consider that not all errors warrant disciplinary action or dismissal.

34. The Petitioner submitted that she was dismissed in a manner that was not procedurally fair. However, she argued that the Respondent acted unreasonably by dismissing her based on charges that did not meet the necessary criteria set by the accuser. Additionally, she submitted that the Respondent’s



- attempt at due process was flawed. The Petitioner cites the cases of Joshua Rodney Marimba V Kenya Revenue Authority [2019] eKLR and Galgalo Jarso Jillo V Agricultural Finance Corporation [2021] eKLR in support of that proposition.
35. The Petitioner submitted that the Respondent violated her human rights under *the Constitution* citing the cases of *Bakboya V Chane & Another (Employment and Labour Relations Petition E147 of 2023)* [2024] KEELRC 293 (KLR) (16 FEBRUARY 2024) (JUDGMENT) and *Sheria Mtaani Na Shadrack Wambui V Public Service Commission & 2 Others* [2021] EKLRC.
 36. The Petitioner submitted that the Public Service Commission had reinstated her vide its judgment dated 7th March 2024 but it set aside the decision because the instant matter was pending before this court. The Petitioner relied on the case of *Kenya Power & Lighting Company Limited V Aggrey Lukorito Wasike* [2017] eKLR, the court held that; “Reinstatement is provided for under Section 49(3) (a) of the *Employment Act* as one of the remedies that a Court, by virtue of Section 50, shall be guided by. It is couched in mandatory terms and requires the court to take into account any of the following matters set out in Section 49(4) (a) to (m) before it can order reinstatement.”
 37. The Petitioner submitted that for general damages, stating that the Respondent, a state corporation, has a constitutional duty to respect individual rights. She claims the Respondent disregarded her rights as an employee and individual, dismissing her response. The Respondent admitted some violations and justified others. The petitioner urges the court to vindicate her to prevent future rights infringements by the Respondent. The Petitioner relied on the case of *Gitobu Imanyara & 2 Others V Attorney General* [2016] eKLR in support of that proposition.
 38. The Petitioner submitted that Clause 4.9 (4.9.1) of the Respondent’s Human Resource Policy and Procedure Manual (2021) provides that when an employee temporarily or permanently acts in a higher vacant position, they will receive an acting allowance of 20% of their basic salary, or as determined by the government.
 39. The Petitioner submitted that for two years she was acting as the Chief Executive Officer contrary to Section 34(4) of the Public Service Act. In the case of *Misheck V Kenya Airways Limited (Cause E6469 of 2020)* [2024] KEELRC 1291 (KLR) (27 May 2024) (Judgment) the court held that employers cannot keep employees in acting positions beyond the duration set by their policies. The court views that the Claimant deserves an acting allowance for the time served, calculated as per the Respondent’s Human Resources Manual.
 40. The Petitioner submitted that the calculation of the acting allowance is consistent with the Human Resource Manual but the Respondent did not pay her 10% of this allowance. Consequently, the Claimant is entitled to either Kshs. 242,678 for the unpaid allowance or Kshs.7,114,000, the salary she should have received as CEO during her extended acting period.
 41. The Petitioner submitted that she is entitled to costs in accordance with section 27 of the *Civil Procedure Act*.

Respondent’s submissions

42. The Respondent submitted that the law on termination of contracts of service is found under Sections 41, 43, 44, 45 and 47(5) of the *Employment Act*.
43. The Respondent submitted that the grounds for terminating the Petitioner were justified and the Petitioner failed to prove her termination was unfair. In the case of *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR the court held for a termination to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with the



establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.

44. In *Evans Kamadi Misango V Barclays Bank of Kenya* [2015] eKLR the court held that under Section 43 of the *Employment Act*, the employer must show a valid reason for termination that a reasonable employer would consider justifiable. Halsbury's Laws of England 4th Edition Vol 16 page 482 elaborates that an employment tribunal must determine if a reasonable employer could have decided to dismiss based on the facts, not just replace its views with the employer's. There is a range of reasonable responses to employee conduct. If the dismissal falls within this range, it is fair; if it falls outside, it is unfair.
45. The Respondent submitted that the Petitioner was subjected to a fair due process, complying with the requirement that employees are notified of intended proceedings in accordance with the constitutional provisions outlined in Article 41 of *the Constitution* which deals with fair labour practices, along with the *Fair Administrative Action Act* and the principles of Natural Justice.
46. The Respondent submitted that the Petitioner is not entitled to the relief sought citing the cases of *CMC Aviation Limited V Mohammed Noor* [2015] eKLR, *Postal Corporation of Kenya V Andrew K. Tanui* and *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 Others* [2019] eKLR.
46. In conclusion, the Respondent submitted that the amended petition lacks merit and should be dismissed with costs.

Analysis and determination

47. The court perused the pleadings and submissions and records the issues of determination as follows:
 - a. Whether the Respondent followed due process in terminating the Petitioner
 - b. Whether the Petitioner is entitled to the relief sought
 - c. Who should bear the costs.

Whether the Respondent followed due process in terminating the Petitioner

48. In the cases of *Walter Anuro Ogal V Teacher Service Commission (Supra)*, *Mary Chemweno V Kenya Pipeline Company Limited* (2014) eKLR and *Loice Otieno V Kenya Commercial Bank Limited* (2013) eKLR outline substantive and procedural fairness require that the employer has a lawful reason for disciplinary action, and the adopted procedure must be fair, just, and lawful.
49. In this instant case, the Petitioner was accused of insubordination and gross misconduct which was communicated vide a letter dated 31st March 2023 and she responded vide a letter dated 18th April, 2023. From the minutes availed before this court, the disciplinary proceedings took place at Lake Naivasha Resort instead of the Respondent's offices as indicated in the pleadings.
50. The Petitioner in her letter dated 18th April 2023 gave a detailed explanation concerning how the impugned examination results were released and the efforts she made to mitigate any disrepute to the organisation by the members of the public.
51. Also Manager Examination Administration Officer one Yuventina Okengo also explained her side of the story and concluded in her letter dated 28th April 2023 by acknowledging her fault and admitted a mistake had happened and offered an apology.
52. Persuaded by the pleadings and the exhibits and authorities the court is of the view the reasons given to the Petitioner in the notice show-cause are even not consistent with the reasons given in the dismissal letter.



Even if there was an oversight in releasing the examination slips which had issues it seems even from the testimony of the examination administration officer it was more of any error rather than a deliberate over act.

There is no evidence adduced of insubordination by the Petitioner as raised in her dismissal letter and though is not in the notice to show-cause though it is alluded but not raised as a substantial point.

53. As far as substantial justification is concerned, the court finds the Respondent has not proved valid reason as to why they dismissed the Petitioner from her employment.
54. As well on the procedural fairness the Respondent through the chain of Human Resources Strategy and Finance Committee issued the Petitioner with a Notice to show-cause letter on 2nd May 2023 and was asked to appear for a Disciplinary hearing on 12th May 2023.
The court noted the Petitioner was not informed of her legal right to appear with a witness being a fellow worker or a union representative of her choice during the hearing.
55. This is a trite requirement under Section 41 of the *Employment Act* 2007.
56. The Petitioner averred that the Respondent was represented by a Senior legal officer at the Disciplinary hearing and as for her she was not represented. She alleges that that worked to her disadvantage.
57. She even says the Respondent's chair of the panel left the meeting before she could present her case.
58. The Petitioner was not given the opportunity to defend herself therefore and thus the Respondent resolved to dismiss her from employment. Dissatisfied with the outcome from 23rd May 2023, the Petitioner appealed and the Respondent's board upheld the decision of 23rd May 2023.
59. The Petitioner appealed to the Public Service Commission which reinstated her and the Respondent applied for review with the Public Service Commission. But nevertheless, the Petitioner still opted to file the petition before the court which is her right.
60. In view of the foregoing, the court holds the Respondent did not follow due process in dismissing the Petitioner by failing to give the Petitioner an opportunity to defend herself in the presence of a witness of her choice and as well the reason given for her dismissal were not valid. Judgment is entered in her favour.

Whether the Petitioner is entitled to the relief sought

61. Having found that the Petitioner was unfairly dismissed, she is entitled to the relief sought as follows:
 - a. On General damages for equivalent of her salary at six (6) months @ Kshs.283,200 x 6 = Kshs.1,699,202/=
 - b. The court awards the acting allowance of Kshs.242,678/= being the 10% that was not paid as an Acting Chief Executive Officer.
 - c. The above compensation is sufficient and prayer for reinstatement will not be entertained.
 - d. The total award is Kshs.1,941,878 plus interest at 14% per annum from date of this judgment till full payment.
62. The Petitioner will have the costs of the petition.
63. Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 8TH DAY OF NOVEMBER, 2024.

ANNA NGIBUINI MWAURE

JUDGE

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.

ANNA NGIBUINI MWAURE

JUDGE

