



Opuka v Judicial Service Commission (Employment and Labour Relations Petition E224 of 2023) [2024] KEELRC 13344 (KLR) (3 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13344 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E224 OF 2023
AN MWAURE, J
DECEMBER 3, 2024**

BETWEEN

CAROLYNE AGANYANYA OPUKA PETITIONER

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

JUDGMENT

Introduction

1. The Petitioner filed a petition dated 29th November 2023.

Petitioner's case

2. The Petitioner avers that she was employed by the respondent as an Office Administrator stationed at Shanzu Law Courts.
3. The Petitioner avers that she received a notice to show letter dated 2nd June 2022 stating that she was required to respond to allegations that she had solicited a bribe of Kshs. 5,000/= for typed proceedings in Shanzu Criminal Case No. 819 of 2018 Republic V Katana Changwe & 5 Others and she had received an advance payment of Kshs.1,500/= paid through her M-pesa number.
4. The Petitioner avers that she responded to the notice to show letter vide a letter dated 15th June 2022 denying the allegations against her.
5. The Petitioner avers that she was interdicted vide a letter dated 24th August 2022 and charged with gross misconduct vide another letter with even date which she was required to respond within 21 days.
6. The Petitioner avers that she responded to the said charges vide a letter dated 8th September 2022 denying soliciting or accepting any bribe in order to do her job and again offering her account of events of the material day that gave rise to the charges which were now being levelled against her.



7. The Petitioner avers that she was invited to a disciplinary hearing scheduled for the 24th February 2023 vide a letter 7th February 2023 which she duly attended.
8. The Petitioner avers that she was not provided with a copy of the complaint against her, access to evidence like Mpesa statements, or the alleged audio recording.
9. The Petitioner avers that lack of transparency and denial of crucial evidence hinder her ability to defend herself. Additionally, she was not allowed to cross-examine the main complainant, further compromising her right to a fair hearing.
10. The Petitioner states that the respondent held a meeting on 16th August 2023, during which a decision was made to dismiss her. She was then served with a dismissal letter on the same date, indicating that her termination from the respondent's service would take effect on 24th August 2022.
11. The Petitioner prays that:
 - a. A declaration that the refusal by the Respondent to call the alleged complainant as a witness at the Petitioner's disciplinary hearing and to grant the Petitioner the chance to cross-examine the said complainant based on the charges levelled against her violated the Petitioner's right to fair hearing as provided under Article 50(2)(k) of *the Constitution* of Kenya.
 - b. A declaration that the denial of grant the Petitioner a copy of the proceedings of her disciplinary hearing as conducted on 24th February 2023 violated the Petitioner's right to access information under Article 35 of *the Constitution* and the right to a fair hearing Article 50 (5)(b) of *the Constitution* of Kenya which is the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee.
 - c. A declaration that the refusal by the Respondent to grant Petitioner copies of any information, material or evidence that it intended to rely on prior to her disciplinary case was a violation of the Petitioner's right to fair hearing and fair administrative action as espoused under Articles 47 and 50 of *the Constitution* of Kenya as well as section 4 of the *Fair Administrative Action Act*.
 - d. A declaration that the Petitioner's disciplinary hearing conducted by the Respondent on 24th February 2023 violated the Petitioner's right to Fair hearing, access to information, fair labour practices and fair administrative action hence same is illegal, null and void ab inito.
 - e. An order of Certiorari bringing into this Honourable Court and quashing the decision of the Respondent to dismiss the Petitioner from service as communicated through the dismissal letter dated 24th August 2023
 - f. An order of Mandamus directed at the Respondent ordering it to reinstate the Petitioner back to work without any loss as to job rank, salary and remuneration.
 - g. An order directing the Respondent to pay the Petitioner all and any salary benefits withheld as a result of the unlawful and unfair interdiction from employment and her eventual dismissal
 - h. Costs of this suit
 - i. Any further orders that this Honourable Court may deem and just to grant in the circumstances.



Respondent's case

12. In opposition to the petition, the Respondent filed a replying affidavit dated 11th March 2024 and a supplementary affidavit dated 28th March 2024 both were deponed by the Chief Registrar, Winfrida Mokaya.
13. She avers that the Petitioner was appointed as Copy-typist on 14th October 1997 and at the time of her dismissal, the Petitioner was office administration I.
14. She avers that the petitioner was dismissed on the grounds of bribery of Kshs.5,000/= for typed proceeding in Shanzu Criminal Criminal Case No. 819 of 2018 Republic V Katana Changwe.
15. She avers that Mr. Leonard Kazungu was coerced by the Petitioner into offering the bribe lodging a complaint with the Office of the Judiciary Ombudsman.
16. She depones that the petitioner received Kshs.1,500 from Mr. Kazungu as a token of appreciation for typing the proceedings which was evident in the petitioner's response to the notice to show cause letter dated 15th June 2022 acknowledging the receipt of money, her response to the charge dated 8th September 2022 and during the hearing before the committee on 24th February 2023.
17. However, she avers that the Petitioner's actions are unethical and illegal because they constituted a bribe. Additionally, the Petitioner did not declare the receipt of the funds and only acknowledged it after the matter was revealed.
18. She avers the Petitioner accepting the money constituted misconduct and a breach of the Regulations, the [Judicial Service Act](#), the [Public Officer Ethics Act](#), the Anti-Corruption and Economic Crime Act, [Leadership and Integrity Act](#).
19. She avers that the Disciplinary Committee opted to adjudicate the matter based on the available evidence which was sufficient to establish the misconduct.
20. She avers that when the Petitioner was invited for the disciplinary hearing, she was duly informed of her right to be accompanied by a witness of her choosing and the Petitioner had an option to invite Mr. Kazungu as a witness to explain the issue at hand.
21. She avers that the respondent's commission reason for dismissing the Petitioner was valid in accordance with section 41 of the [Employment Act](#), sections D.7.2.2, D.7.2(ix) of the Judiciary Human Resource Policies and Procedures Manual, Paragraph 19 of Part IV of the Third Schedule of the [Judicial Service Act](#) 2011.
22. She avers that the Petitioner's dismissal from employment was fair as the Petitioner was accorded a fair hearing in accordance with the provisions of Articles 35, 47 and 50 of [the Constitution](#).
23. She avers that the respondent adhered to all the stipulated guidelines of its disciplinary process when dismissing the Petitioner, as provided for under the [Judicial Service Act](#), the [Fair Administrative Action Act](#), Judiciary Human Resource Policies and Procedures Manual.

Petitioner's submissions

24. The Petitioner submitted that she was not afforded a fair hearing, which violated their rights to information, fair administrative action, fair labour practices, and a fair hearing.



25. In *Anthony Mkala Chitavi V Malindi Water & Sewerage Company Ltd* (2013) eKLR the court stated that section 41 of the *Employment Act* requires that the responsibility established is upon the employer and the employer must prove that the termination was in accordance with fair procedure.
26. In *Beatrice Nyambune V Judicial Service Commission* [2019] eKLR the court held that in employment matters, the employer must prove both valid reason and fair procedure. In *Kenfreight (E.A) Limited V Benson K Nguti* [2016] eKLR the Court of Appeal held that the employer has the burden of proof to show the termination was both fair and followed proper procedure. The employee on the other hand needs to state that the termination was unfair, shifting the burden of proof back to the employer to justify the termination.
27. The Petitioner submitted that she was unfairly dismissed by the Respondent by violating her constitutional rights by denying her a fair hearing, access to information and the right to cross-examine witnesses.
28. In *Beatrice Nyambune V Judicial Service Commission*(Supra) held as follows:

“Having found that the respondent disregarded its own mandatory statutory procedures that provide for the right of the petitioner to a fair hearing. I find the whole process was so flawed as was any outcome of the flawed process with the result that the decision to dismiss the petitioner cannot stand the test of both Article 47 of *the Constitution* and Section 7 of the Fair Administrative Actions Act.”
29. The Petitioner submitted that the court has the power to reinstate an employee who was unfairly dismissed under section 49(3) of the *Employment Act*. The Petitioner argued that she was not given a fair process before being dismissed and she had worked for the respondent for over 20 years without any complaints.
30. The Petitioner submitted it is grossly unfair to dismiss her with such a long and exemplary service on record on the basis of a sham disciplinary process that violated her constitutional rights.
31. In conclusion, the Petitioner prays that the entire petition be allowed as prayed.

Respondent’s submissions

32. The Respondent submitted that the advocate “Benard Milewa Advocates” who commissioned Petitioner’s further affidavit sworn on 12th April 2024 is defective as he is not found on the Advocates’ search engine of the Law Society of Kenya and prays the same to be struck out.
33. The Respondent relied on the case of Mohamed *V Judicial Service Commission (Cause E645 of 2022)* [2023] KEELRC 2983 (KLR) (17 November 2023) (Ruling) the court cited the case of *David Wamatsi Omusotsi V The Returning Officer Mumias East Constituency & 2 Others Petition No. 9 of 2017*[2017] eKLR held as follows:

“The issue therefore was whether, on the face of the document itself, the affidavit in issue was taken by a commissioner for oaths, duly appointed. It was not. The affidavit showed on the face of it that it was taken by Bwonwonga & Co Advocates & Commissioner for Oaths, not by any Bwonwonga, Advocate who could well have been a duly appointed commissioner for oaths. Bwonwonga & Co Advocates could not have been appointed commissioner for oaths under section 2(1) of the Act. Such appointment could only be of an advocate in practice, not a firm of advocates.”



34. The Respondent submitted that the Petitioner accepted the payment of Kshs.1,500/= which was in the guise of a token of appreciation and so breached Section D. 7.2(ix) of the Judiciary Human Resource Policies and Procedure Manual and Regulation 63(2) of the Judicial Service (Code of Conduct and Ethics) Regulations, 2020. The Petitioner also breached sections 11(2)(a) and 11(3) of the Public Officer Ethics Act, section 46 of the Anti-Corruption and Economic Crimes Act and Section 14(2)(b) of the Leadership and Integrity Act finding the Petitioner's termination was valid and fair.
35. The Respondent relied on the case of Alice Nvanduko Omwancha V Kenya Industrial Estates Limited [2019] eKLR the court held that the respondent proved the claimant solicited and accepted a bribe of Kshs.30,000 from Grace Mwaka in April 2012 to secure a permanent appointment. This act constituted gross misconduct under the Employment Act and the respondent's HR Policy. Consequently, the court concluded that the respondent had a valid and fair reason for the claimant's summary dismissal, as required by sections 43 and 45 of the Employment Act.
36. Also, in Sande V NCBA Bank Kenya PLC (Cause 269 of 2020) [2023] KEELRC 808 (KLR)(28th March 2023) the court held that the claimant admitted being aware of the policy regarding gift disclosure but received over Kshs. 129,650/= from service providers without disclosure. An employee breaching confidentiality and trust cannot claim unfair termination, as established in previous cases. Despite her claims of not soliciting money, the claimant admitted receiving gifts over the policy threshold and failing to disclose them, unlike other employees. Breaching the policy warranted summary dismissal under the law. Investigations confirmed she received money via M-pesa from service providers, justifying her termination.
37. The Respondent submitted that the reasons for the Petitioner's termination were fair and valid, and the Petitioner's allegations against the termination are unfounded and lack evidentiary support.
38. The Respondent submitted that the Petitioner was accorded a fair hearing and the procedure used by the Respondent in reaching its decision to dismiss her procedurally lawful and fair in compliance with Articles 35, 47 and 50 of the Constitution of Kenya, the Judicial Service Act and provision of the Fair Administrative Action Act 2015.
39. The Respondent submitted that the Petitioner was provided with all necessary documents and has not pointed out any document used in the proceedings that she lacked access to. Additionally, the Petitioner has not shown how the absence of any particular document, if it existed, impacted her defence.
40. The Respondent argued that the Petitioner had the opportunity to challenge the evidence presented. The Petitioner's claim that the Respondent refused to present audio recordings during the disciplinary proceedings is unfounded, as the Respondent did not mention any such recordings during the hearing.
41. The Respondent submitted that it was not required to summon Mr. Leonard Kazungu, the secretariat of the Office of the Ombudsman's Judiciary, for the disciplinary hearing. Furthermore, the Petitioner has not shown that the Committee's decision not to summon this individual caused her any injustice or prejudice. In any case, the Petitioner had the opportunity to invite the witnesses herself, but she did not do so.
42. The respondent relied on the case of Judicial Service Commission V Mbalu Mutava & another [2015] eKLR the Court of Appeal cited the case of Nancy Makhoha Baraza v Judicial Service Commission & 9 Others [2012] eKLR, illustrating that an investigation is not the same as a trial, and witness cross-examination is rare unless the law mandates it. The decision to summon or cross-examine witnesses is up to the investigating body, as technical rules of evidence do not apply to natural justice or fair administrative action. It was argued that when the Judicial Service Commission (JSC) called witnesses,



it expanded the inquiry's scope. However, this was incorrect because Article 168(4) of *the Constitution* does not grant JSC the authority to conduct fact-finding via cross-examination, which lies outside its powers.

43. Also, in *Michael Njoroge Mugo V Laikipia University* [2018] eKLR the court held that The failure to call the University Medical Officer is acknowledged, but a disciplinary hearing is not required to follow courtroom procedures. The Claimant did not prove that this omission caused him any injustice. Additionally, the minutes indicated that the University Medical Officer was not present at the hearing on 8th May, 2015. The Court concluded that the Respondent's process substantially complied with statutory requirements and the contractual agreement.
44. The Respondent submitted that the Petitioner is not entitled to the declarations sought because the alleged infringements of her rights are unsubstantiated, and the Respondent did not breach or violate any of her rights as claimed. The Respondent relied on the case of *Dry Associates Limited V Capital Markets Authority & another Interested Party Crown Berger (K) Ltd* [2012] eKLR the court stated that it is important to consider fairness under Article 47 of *the Constitution* within the specific context of the case, including the nature of the proceedings and the statutory framework. The suggestion that the petitioner is entitled to a full oral hearing with all its formalities including witnesses, statements, evidence in chief, cross-examination, and oral submissions is rejected.
45. The Respondent argued that the Petitioner is not entitled to the order of certiorari because her termination was fair and lawful, both procedurally and substantively. Her termination was due to gross misconduct after a thorough disciplinary process that complied with Articles 35, 47, and 50 of *the Constitution*, the *Fair Administrative Action Act*, the Third Schedule of the *Judicial Service Act*, and the Judiciary Human Resource Policies and Procedure Manual.
46. The Respondent submitted that the Petitioner is not entitled to the Order of Mandamus directing the Respondent to reinstate her since termination was lawful and fair citing the case of *Kenya Airways Limited & Allied Workers Union Kenya & 3 Others* [2014] eKLR in support of the proposition.
47. The Respondent submitted that the Petitioner is not entitled to any withheld salaries and benefits because her termination was lawful and fair. Furthermore, the Respondent stated that there were no arrears owed to the Petitioner at the time of her termination.

Analysis and determination

48. In *Walter Anuro Ogal V Teachers Commission* [2013] eKLR where the court held that for termination of employment to pass the test of fairness test, there must be both substantive and procedure fairness.
49. Sections 41 and 43 of the *Employment Act* provide for procedural fairness and substantive justification.
50. The pleadings filed in court demonstrate the Petitioner received some Kshs.1,500/= apparently from one of the persons who had applied for proceedings from the court.

The client who was a father of the deceased in the Criminal Case No.819 of 2018 had complained to the Ombudsman that the Petitioner had demanded Kshs.5,000/= to type the proceedings. He already paid a deposit of Kshs.1,500/= on 13th May 2022.

The Petitioner was issued with a notice to show-cause letter dated 4th August 2022 and the grounds for gross misconduct were well articulated in the said letter.

51. The Petitioner after putting her response to the notice to show cause was invited for a disciplinary hearing by the letter dated 7th February 2023 and the hearing was scheduled for 24th February 2023.



The petitioner was asked to attend with her witness and her advocate.

After the disciplinary hearing the Petitioner was informed on 18th August 2023 that the Human Resource Management Advisory Committee did not exonerate the Petitioner of gross misconduct. She was issued with a dismissal letter and was effective from 24th August 2022.

52. As far as reasons for dismissal were considered there is evidence the Petitioner was given Kshs.1,500/= by a person whose proceedings she was typing. The complainant avers she demanded for the money and an advance was paid.

She also admits the complainant had visited her and was bitterly complaining of delay in typing the proceedings.

53. The Petitioner says she typed the proceedings but she received the Kshs.1,500/= which she believed was given as a token of goodwill. She apologised for the same and refunded the amount.

The court is not convinced the members of the public are bound to give tokens of appreciation to public officer for delivering their duties.

In any event, the complainant could not have reported the matter to Ombudsman if he was satisfied with the services rendered by the Petitioner.

From the evidence of the Petitioner the payment was made on 13th May 2022 but it is not quite clear when the proceedings were returned to the registry for dispatch to the complainant.

54. The court is satisfied that the Respondent satisfied the requirement to give a valid reason for summary dismissal. Section 45(1) of the *Employment Act* provides as follows:

“ 45

- (1) No employer shall terminate the employment of an employee unfairly.”

55. Also Section 47(5) of the same Act as well provide as follows:

“ 47

- (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

56. In the case of Alice Nyanduko Omwanicha -vs- Kenya Industrial Estates Limited (2019) eKLR the court held:

“ After careful consideration of the evidence and submissions presented by both parties, this court finds that the respondent has proved on a balance of probability that the claimant solicited for a bribe from Grace Mwaka on diverse dates in April 2012 and that on 23.4.2012, she indeed received from Grace Mwaka, Kshs.30,000 as a bribe to induce her to secure permanent appointment in the position of Administrative Assistant. The said offence amounted to gross misconduct under the *Employment Act* section 44 (4) (g) and the respondent’s HR Policy on Discipline and as clearly explained in the dismissal letter above.



Consequently, I return that the respondent has proved that she had a valid and fair reason that justified the summary dismissal of the claimant as required by section 43 and 45 (2) (a) and (b) of the Act.”

57. The court would not take soliciting a bribe as a small matter irrespective of the amounts involved. The Petitioner breached the tenets of Section 44 of the *Employment Act* and the Code of Ethics of the employer. The Petitioner did not deny she received the money and she proceeded to refund the same.
58. The court is well persuaded that the Respondent had valid reasons to terminate the petitioner from her employment.
59. As for the procedural fairness the court finds the Respondent complied with Section 41(1) of the *Employment Act*. The same provides as follows:

“ 41.

- (1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

60. During the proceedings the Petitioner did not raise any issues of failure to supply her with any documents. She did not ask for any witnesses to be called. These are issues she only raised in her claim.
61. The Petitioner was taken through fair disciplinary hearing and was informed of the opportunity to avail a witness and an advocate.

After the proceedings she was given a dismissal letter and she appealed the decision.

The court is informed Petitioner was advised of the outcome of the appeal and Petitioner was informed of her right to review the appeal.

62. Having said so the court is satisfied the Petitioner was given valid reasons for her dismissal and was taken through the right process.

Even though in her Petition she says the respondent did not invite the complainant or the officer from Ombudsman office as witnesses however, in disciplinary proceedings it is not necessary to always call witnesses. In the case of Judicial Service Commission -v- Mbalu Mutava & another (2015) eKLR the court held:

“ All these cases including Nancy Makhoka Baraza (Supra) case show that an investigation is not a trial and that cross-examination of witnesses, if called is a rare occurrence.”

63. The court has considered the pleadings, submissions and precedents. There is no doubt that due process was followed and reasons for the termination of the Petitioner were valid and were well communicated to her.
64. Also Sections 107, 108 and 109 of the *Evidence Act* Chapter 80 Laws of Kenya provide that he who alleges must prove. The minutes dated 24th February 2023 show that the office of the Judiciary Ombudsman recommended charges against the Petitioner for gross misconduct. The Petitioner



acknowledged that she received the money but refunded and asked for forgiveness. The respondent complied with Section 107, 108 and 109 of the Evidence Act.

65. This Honourable Court is of the view that the Petitioner was fairly terminated. In *Beatrice Nyambune V Judicial Service Commission (Supra)* the court held that the employer must prove both valid reason and fair procedure. The court is satisfied both substantive justification was proved in the matter as well as procedural fairness.

In view of the foregoing, the court finds the Petitioner was fairly terminated and therefore the Petition is not merited. It is dismissed.

66. Each party will meet their costs of the Petition.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD DAY OF DECEMBER, 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

