**Gatimbu v University of Embu & another (Judicial Review E001 of 2022) [2023] KEELRC 126 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 126 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU**

**JUDICIAL REVIEW E001 OF 2022**

**ON MAKAU, J**

**JANUARY 26, 2023**

**BETWEEN**

**KIENDE KARAMBU GATIMBU ..... APPLICANT**

**AND**

**UNIVERSITY OF EMBU ..... 1ST RESPONDENT**

**DEPUTY CHANCELLOR (PLANNING, ADMINISTRATION & FINANCE), UNIVERSITY OF EMBU ..... 2ND RESPONDENT**

## JUDGMENT

1. The applicant is employed by the 1st respondent as a lecturer. By the letter dated May 24, 2022, the respondents accused her of negligent performance of duty in marking examination papers for students at the University. She responded by requesting for certified copies of the documents referred to in the show cause letter but, she was given limited access for the reason that some were classified as restricted information.

2. The applicant would not accept the limited access and persisted in her demand for all the documents before responding to the show cause letter. As a result the respondents invited her to a disciplinary hearing vide the letter dated September 15, 2022. She was aggrieved and she filed application for leave to bring judicial review proceedings. The court directed her to serve the application.

3. The leave was granted by consent on October 12, 2022 and the applicant filed the notice of motion dated October 31, 2022 seeking the following orders:-

    i. That an order of certiorari to quash the decision by the respondents, *vide* the letter dated September 15, 2022, to institute unprocedural, illegal and unconstitutional disciplinary proceedings against the *ex parte* applicant.

ii. That an order of prohibition directed to the respondents prohibiting them, directly and/or through their servants and/or agents from instituting unprocedural, illegal and unconstitutional disciplinary proceedings against the *ex parte* applicant.

iii. That an order of mandamus to and compelling the respondents to furnish the *ex parte* applicant with certified copies of all documents and/or witness statements to be relied upon during the intended disciplinary proceedings.

iv. That the costs of this application be provided for.

4. The respondents opposed the application by the replying affidavit sworn on November 10, 2022 by the 1st respondents Deputy Vice Chancellor Prof Eucharia Kenya. The affiant gave details of the applicant's negligence in marking exam papers as discovered by the external examiners. The alleged negligence related to the marking, recording and transfer of marks that had resulted to mass failure in the 5 units taught by the applicant.

5. He further deposed that the applicant was served with a show cause letter dated May 24, 2022 but he demanded for certified copies of the documents referred to in the show cause letters. On July 7, 2022 a letter was addressed to her giving her limited access on July 14, 2022 as the documents requested for were classified as restricted information by the University Policy and Guidelines on Information Security Management. However the applicant failed to show up to see, peruse and examine the requested documents.

6. The affiant further deposed that the applicant persisted in her demand for copies of the requested document until September 15, 2022 when she was addressed a letter inviting her to a disciplinary hearing. However the applicant filed this case before exhausting the internal appeal mechanism. Consequently, the respondent maintained that the suit is premature as it violates the doctrine of exhaustion under section 9 (2) and (3) of the *Fair Administrative Actions Act.*

7. The affiant further deposed that the decision under review does not amount to a reviewable decision since it is a mere invitation to attend disciplinary hearing. He further deposed that the disciplinary process under review is lawful and the respondents are in compliance with the University Code of Regulations, the Employment Act, *Fair Administrative Actions Act*, *Universities Act* and the *Constitution*. Consequently the respondents' case is that the applicant has not laid any basis as to why this court should interfere with the universities decision and urged the court to let the disciplinary process run its course.

**Submissions**

8. Mr Liech learned counsel for the applicant argued the application on behalf of his client. Basically he adopted the facts set out in the verifying affidavit sworn in support of the application for leave and supplementary affidavit filed with the main motion, sworn on October 31, 2022. He further adopted the bundle of authorities in the list dated November 17, 2022.

9. He reiterated how the applicant was served with a show cause letter accusing her of negligence in exam marking but when she requested for copies of the cited documents she was denied and thereafter she was summoned to a disciplinary hearing but without the requested documents, she could not attend the hearing to defend herself.

10. The counsel submitted on three issues namely:-

a) Whether the applicant has laid a basis for grant of the judicial review orders sought.

b) Whether the applicant has exhausted internal mechanism of dispute resolution.

c) Whether this court can intervene in the respondent's disciplinary procedure.

11. On the first issue the counsel stated that the applicant is required to show that the impugned decision is tainted with illegality, irrationality and procedural impropriety. The counsel placed reliance on section 7 of the *Fair Administrative Actions Act* which sets out the grounds for judicial review.

12. Starting with illegality it was submitted that the court defined illegality in the case of *Republic v Secretary of the Firearm Licencing Board & 2 Others Exparte Senator Johnson Muthama* [2018] eKLR.

13. In the instant case it was submitted that the impugned decision is tainted with illegality because first it violated the applicant's right to fair administrative action under article 47 of the *Constitution* by being denied material to be used against him during the disciplinary hearing. Secondly, the impugned decision has violated the applicant's right to access to information under article 35 (1) of the *Constitution* read with section 11(3) of the *Access to Information Act* (A1 Act) which requires an administrator to provide information which is to be relied upon in making administrative action. Third her right to fair hearing under article 50 of the *Constitution* was violated including right to prepare for hearing.

14. For emphasis, reliance was placed on the case of *Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR and *Gladys Shollei v Judicial Service Commission & Another* [2022] KESC 5 (KLR).

15. As regards irrationality, it was submitted that the denial of the documents means that the applicant should memorize the information given and use it during the hearing. Such expectation was deemed as irrational by applicant.

16. On the issue of procedural impropriety, it was submitted that it includes failure to act fairly by the decision maker, failure to observe rules of natural justice and failure to comply or observe the procedural rules laid by the law. It was argued that the respondents here have violated section 8-13 of the *AI Act*. Further clause 12.8.1 of the respondents HR Policies and Procedures Manual was violated because the applicant has not been called to appear before an investigations committee as required.

17. Also clause 12.6.1 which requires that disciplinary hearing be preceded by an investigation has been violated by the respondents converting investigatory process into a disciplinary hearing before giving the applicant a chance. To fortify the above submission reliance was placed on the Gladys Boss Shollei case where it was held that where investigatory process turns into a disciplinary process, the employee must be provided with the requisite material to prepare his/her defence. In the present case, it was reiterated that the applicant was denied the requisite documents.

18. As regards the doctrine of exhaustion, it was submitted that the alternative remedy of appeal under clause 12.13 of the HR Manual does not apply to this case since there is no final decision made after a disciplinary hearing. Reliance was placed on the case of *Muhamed Ali Baadi & Others v The Attorney General and 11 others* [2018] eKLR where the court held that the alternative forum must be accessible, affordable and effective. In the instant case however, it was submitted that the mechanism provided by the HR Manual is neither accessible nor effective.

19. On the last issue of power of the court to intervene in internal mechanism, it was submitted that it can be done if there is procedural impropriety and irregularities. Reliance was placed on the case of *Anne Wambui Kamuiru v Kenya Airways Ltd* [2016] eKLR. Further it was urged that the applicant

is not seeking to stop the disciplinary hearing altogether but rather asking the court to intervene to make the process fair.

20. Ms Githogori learned counsel for the respondents opposed the application. She relied on the aforesaid replying affidavit and the list of authorities dated October 24, 2022. From the onset it was submitted that Judicial Review remedy does not concern itself with the merit of the decision but the decision making process. Further it was observed that the motion before the court has not faulted the decision making process but only alleging denial of copies of documents.

21. It was further submitted that the application for an order to quash a letter inviting the applicant to disciplinary which in the respondents view does not constitute a decision capable of being quashed by the court. To fortify the said view reliance was placed on the case of *Kiama Wangai v Egerton University* [2015] eKLR where the court held that an invitation letter to attend disciplinary hearing does not constitute a decision capable of being quashed.

22. It was submitted that the applicant has admitted to not seeking to stop the disciplinary process and as such there is no basis for quashing the invitation letter. It was argued that the application is premature and speculative since it has not been alleged that the applicant was denied a hearing. Accordingly it was submitted that there is no prima facie case disclosed.

23. It was argued that clause 12 of the HR Manual was followed to the letter by instituting investigations under clause 12.8.1 which culminated in the show cause letter dated May 24, 2022 by the 2nd respondent. The applicant failed to show cause why disciplinary action should not be taken against her prompting the respondent to invite her for disciplinary hearing vide the impugned letter. Consequently the court was urged to let the disciplinary process by the employer to continue to the end as there are no irregularities shown by the applicant.

24. As regards the order for mandamus, the court was referred to paragraph 7 of the replying affidavit and urged to invoke section 11 (3) of the *A1 Act* which provides that a request for documents is allowed only if it is practical to do so. It was submitted that the applicant has admitted that he was allowed to see, examine, peruse and inspect the requested documents and her only complaint is that she was not allowed to take copies of the same.

25. It was further submitted that pursuant to section 35 of the *Universities Act*, the 1st respondent has formulated policies known as Information, Classification, Handling and Transfer Policy of December 2017; and a second one called Directorate of University Examinations Information Security Management System Guidelines of October 2020. Clause 4.10 of the latter policy was said to classify different information and also formulate policies on how to access the information based on the said policies, it was submitted that the applicant was granted limited access to information.

26. It was further submitted that section 6 (1) (g) of the *AI Act* provides for limitation of the right of access to justice under article 35 of the *Constitution* and hence the basis of the aforesaid university policies. It was submitted that the said policies have not been challenged as being unconstitutional. It was contended that applicant has not been denied access to information, material and evidence that will be used at the disciplinary hearing. It was contended that she was allowed access to information as required by Section 4 (3) of the *FAA Act*.

27. Besides it was submitted that the applicant has come to court before exhausting the internal mechanism as required by section 9(2) and (3) of the *FAA Act* as such the application should be dismissed with costs.

28. By way of rejoinder, Mr Liech Advocate submitted that the letter dated September 15, 2022 is an administrative action capable of being challenged by judicial review. Reliance was placed on section

2 of the *FAA Act* that defined what administrative action and a decision mean. It was submitted that The Kiama Wangai case dealt with stay pending appeal at the Court of Appeal and had nothing to do with the letter inviting the professor to disciplinary hearing. It was argued that the impugned letter is not a mere letter but a serious letter inviting the applicant to a disciplinary hearing.

29. It was also submitted that the respondent has failed to comply with section 11 (3) of *AI Act* and the cited policies cannot be used to deny a right to access information made under section 6 of the *AI Act*. It was argued that it was irresponsible for respondents to say that the requested documents will be availed during the hearing.

**Analysis And Determination**

30. There is no dispute that the respondents have commenced disciplinary proceedings against the applicant for alleged negligent performance of her duties with respect to exam marking. The issues for determination are;

    a) Whether the suit is premature and in breach of the exhaustion doctrine.

    b) Whether the applicant has laid any basis for grant of the judicial review orders sought.

**Premature Suit**

31. The respondents content that the suit is premature and offends the doctrine of exhaustion as codified by section 9 of the *FAA Act*. However the applicant maintains that there is no other effective internal mechanism that could resolve the dispute. Further she argues that the court can intervene in internal process if the due process is being violated or if the process is marred with irregularities.

32. The court agrees that the court can intervene in internal disciplinary process based on certain thresholds. In so doing the court does not stymie the disciplinary process or muzzle the employer from conducting the disciplinary action altogether. The court only intervenes to ensure that the process is done in accordance with the law, contract of employment, employer's HR procedures, and the rules of natural justice.

33. I gather support from the case of *Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR where Ndolo J held that:-

> "...in cases where an employee facing disciplinary action legitimately feels that the process is marred with irregularities or is stage managed towards their dismissal, the court will intervene not to stop the process altogether but to put things right."

34. I fully adopt the foregoing position but add that, whereas the court should eschew micro-managing internal processes, it should nevertheless not be quick in sending away employees from the courtroom when they seek its intervention. The court ought first to consider whether they have laid any basis for the requested intervention and whether there is any internal appeal or review mechanism for redressing the grievance.

35. In this case I am satisfied that there is no internal forum for redressing the grievance raised herein. The appeal mechanism provided under clause 12.13 of the respondents HR Manual related to a disciplinary action and not interlocutory decisions. A disciplinary action is the punishment meted to an employee by the employer after being found guilty of misconduct like warning, reprimand, demotion, dismissal among others. Consequently, I find and hold that the suit herein is not premature and the doctrine of exhaustion has not been offended by it.

**Basis Laid For Review**

36. The decision against which review is sought is contained in the letter dated September 15, 2022. The letter invited the applicant to appear before the staff disciplinary committee on October 4, 2022 for disciplinary hearing in respect of charge of failure to perform her duties diligently while marking examinations. Before then the applicant moved to court and obtained stay orders.

37. She alleged that the disciplinary process is tainted which illegality, irrationality and procedural impropriety. Specifically the applicant is alleging that her right to fair administrative action, right of access to information and right to fair hearing have been violated by being denied copies of documents to be used as evidence against her during the disciplinary hearing which she was invited to, through the impugned letter. Such violation, according to the applicant amounts to illegality and procedural impropriety. Further the applicant deems that it is irrational for the respondents to insist that she memorizes the information in the requested documents and wait for the documents to be availed at the hearing.

38. The respondents maintain that they have acted fairly and within the law, the HR Manual and University Policies by according the applicant limited access to the information sought. Therefore they deny the allegation that the applicant has been denied access to the documents she requested for.

39. I have carefully considered the facts of the case and the authorities cited. It is clear from the record that after being served with show cause letter, the applicant responded by asking for copies of the documents referred to in the show cause letter. There is evidence that she was given copies of some of the documents but the rest, she was invited to see, peruse, examine and inspect without taking copies because the documents were classified as restricted information under the University Policies. However the applicant rejected that limited access to the documents and insisted on her demand for copies of all the documents.

40. It is common knowledge that access to information is not an absolute right under article 25 of the *Constitution*. It is therefore a right that can be limited by a law pursuant to article 24 of the *Constitution*. In that regard Section 6(1) of the *Access to information Act* (AI Act) provides that pursuant to article 24 of the *Constitution* the right to information shall be limited in respect of, among others, if it is likely to

> "(d) Involve the unwarranted invasion of privacy of an individual, other than the applicant or person on whose behalf an application has, with proper authority, been made"

41. Section 11 (3) of the *Act* which was invoked by the respondents provides that:-

> "(3) Any information to be made accessible to an applicant shall be produced forthwith at the place where it is kept, for inspection in the form in which it is held unless the applicant requests that it be made available in another form, if it is practicable to do so, such information may be copied, reproduced or used for conversion to a second transmission at the expense of the applicant." (emphasis added)

42. In my view the said limitation is reasonable and justifiable in a democratic society in order to protect the rights and interest of the society at large and individual persons who may be prejudiced or embarrassed by the free access to information to the extent of making copies.

43. In my view the cardinal right is to avail the information in the manner in which it is kept for inspection. Once that access is granted, the right to make copies may be restricted depending on the nature of the documents involved. In this case the court was shown policy documents enacted by the respondents pursuant to statute law to manage information held by the university.

44. Clause 4.0 of the Directorate of University Examinations Information Security Management Systems Guidelines of October 2020 classifies different information and formulates policies on how to access the information. Clause 4.1.1 provides a table of four classes of information of which layer 1 is not restricted while layer 2 is restricted. Layer 3 is classified confidential and layer 4 is highly confidential. The applicant was given limited access to the documents under layer 2, 3 and 4.

45. I agree with the respondents that granting free access to the applicant to such restricted and confidential information could be in breach of the University Policies and may prejudice the students' rights. One wonders what was the purpose of copies of the documents if they were to be shown to the applicant and then be availed at the hearing for verification.

46. This court finds that the limited access of the information accorded to the applicant with the undertaking by the employer to avail the document during the disciplinary hearing was fair enough within the meaning of section 4 (3) of the *FAA Act* which requires the administrator to give information, materials and evidence that will be used at the hearing.

47. Accordingly, this court is not satisfied that the applicant has proved on a balance of probability that the respondents have violated her right of access to information and fair administrative action. The granting of limited access to the information requested for by the applicant has been explained and justified on the basis of the relevant statutes and University Policies formulated pursuant to the said statutes.

48. The High Court in *Republic v Secretary of the Firearm Licencing Board & 2 Others, Exparte Senator Johnson Muthama* [2018] eKLR cited with approval the Ugandan decision in *Pastoli v Kabale District Local Government Council & Others* [2008] 2 EA 300 thus:-

> "In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety..."

49. I have already made a finding of fact that there is no proof that the impugned letter and the intended disciplinary process is tainted with illegality, irrationality or procedural impropriety. In my view the opposite is correct, that is to say, that the respondents have acted fairly by entertaining the request for information by the applicant and adequately explained the reason why copies of the documents requested for cannot be freely given to her.

50. In the end the court finds that the applicant has not laid any basis for granting of the judicial review orders sought by the notice of motion dated October 31, 2022 which now stands dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 26TH DAY OF JANUARY, 2023.**

**ONESMUS N MAKAU**

**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 April 2020, this judgment**

**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.**

**ONESMUS N. MAKAU**

**JUDGE**