



**Omutiti v Riara Group of Schools (Employment and Labour Relations Petition
E081 of 2021) [2023] KEELRC 122 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 122 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E081 OF 2021
BOM MANANI, J
JANUARY 26, 2023**

BETWEEN

APOLLO AMANYA OMUTITI PETITIONER

AND

RIARA GROUP OF SCHOOLS RESPONDENT

JUDGMENT

1. The Petitioner was until the March 18, 2021 employed as a teacher at the Respondent institution. He was terminated on the aforementioned date.
2. According to the Petitioner, the termination was in breach of his constitutional rights as it was not founded on legitimate grounds. He has thus sued the Respondent seeking the various reliefs in the Petition.
3. The Respondent denies terminating the Petitioner's employment unlawfully. According to the Respondent, the Petitioner was involved in immoral activities within the school, contrary to the Respondent's ethos. This necessitated the immediate separation of the parties.

Petitioner's Case

4. The Petitioner avers that he was hired on June 10, 2019 to teach arts at the Respondent's schools. The parties signed a contract of even date.
5. It is the Petitioner's case that although the contract of employment was initially on probationary terms, the Respondent neither confirmed nor terminated him at the close of the probationary period. Therefore, the contract between the parties was deemed to have been constructively confirmed.
6. The Petitioner asserts that during the currency of his employment, the Respondent's senior staff subjected him to alleged unexplained harassment. For instance, he says that the Respondent's management required him and other members of staff to repeat assignments without apparent reason.



- He also accuses the deputy head teacher of the Respondent's school of allegedly: using derogatory language against him; unlawfully recording proceedings of a meeting with the Petitioner; forcing the Petitioner to work overtime; and accusing the Petitioner of circulating obscene materials in the school.
7. The Petitioner asserts that even after raising these complaints with the Respondent's human resource office, no action was taken to redress them. Instead, he was asked to go back and resolve the issues with the deputy school teacher.
 8. The Petitioner asserts that in an unexplained turn of events, he was put on a performance improvement plan and issued with a letter of notice to show cause immediately thereafter. He asserts that he was thereafter suspended from duty without pay and directed to appear before a disciplinary panel on March 10, 2021.
 9. That at the disciplinary session, he was denied the right to present his defense. That immediately after, the Respondent issued him with a letter dated March 18, 2021 terminating his employment contract.

Respondent's Case

10. On its part, the Respondent denies violating the Petitioner's rights as alleged or at all. The Respondent specifically denies that its deputy head teacher harassed the Petitioner as alleged by the Petitioner.
11. It is the Respondent's case that the school's management noted that the Petitioner was underperforming on his core mandate and had deviant behaviour. That this prompted the Respondent to put the Petitioner on a performance improvement plan through a letter dated January 29, 2021.
12. The Respondent avers that between 24th and February 25, 2021, the Petitioner sent unsolicited pornographic materials to several of the Respondent's senior members of staff. That the materials emanated from the Petitioner's email address. The Respondent states that the sharing of the pornographic content was in contravention of its e-learning guidelines which the Petitioner was aware of.
13. It is the Respondent's case that although the Petitioner alleges that his email was hacked, he did not provide evidence to support this contention. The Respondent avers that it issued the Petitioner with a letter of show cause in reaction to the circulation of the pornographic material.
14. It is the Respondent's case that the Petitioner was thereafter invited to a disciplinary session where he was given a fair chance to ventilate his case. That the Petitioner was unable to convince the disciplinary panel about his non-involvement in the circulation of the pornographic material. That as a result, a decision was taken to summarily terminate his services.

Hearing of the Petition

15. The parties agreed to canvass the Petition on the basis of the affidavit evidence on record. To elaborate on the affidavit evidence and other pleadings, the parties agreed to file written submissions.

Issues for Determination

16. After analyzing the pleadings and documents annexed to the affidavits filed by the parties, the following are the issues for determination:-
 - a. Whether the Petition raises a constitutional issue.
 - b. Whether termination of the Petitioner's contract of employment was unfair.



- c. Whether the parties are entitled to the reliefs sought in their pleadings.

Analysis

17. The issues that the Petitioner raises in the Petition are founded on the contract of employment between the parties. Although article 41 of the [Constitution of Kenya 2010](#) has elevated employment rights into constitutional rights, there is an elaborate statutory regime that Parliament has put in place to address disputes arising from employment relations. This regime, in large part, undergirds the constitutional framework aforesaid.
18. A careful consideration of the Petition as drafted yields the inevitable conclusion that it does not, with any measure of precision, disclose the Petitioner's constitutional rights that have been violated. The Petitioner does not describe how the impugned conduct of the Respondent resulted in a violation of his constitutional rights or the [Constitution](#) generally.
19. Besides laying out articles of the [Constitution](#) at paragraphs one to eight of the Petition which allegedly provide the constitutional foundation for the case, the Petitioner does not provide the factual linkage between these provisions and his case. At paragraph 16 of the Petition where the Petitioner was to specify the alleged acts and omissions by the Respondent that resulted in the violation of the [Constitution](#) and his constitutional rights, all that he does is recite various articles of the [Constitution](#) without more. This recital is then followed with a general statement to the effect that the court has jurisdiction to hear the Petition to redress the Respondent's violation of the Petitioner's rights. In effect, I do not understand the Petition as raising a constitutional question relating to the impugned conduct of the Respondent for the court's determination.
20. The questions whether the Respondent had valid reason to terminate the Petitioner and whether the Respondent allowed the Petitioner the opportunity to present his defense before the disciplinary panel are, in my honest view, matters which are adequately addressed under sections 41, 43, 45 and 47 of the [Employment Act](#). A litigant ought not to sidestep these specific provisions of statute and attempt to constitutionalize what is otherwise an ordinary grievance premised on breach of a contract of employment by merely invoking various provisions of the [Constitution](#) without more.
21. The increasing practice of litigants resorting to the [Constitution](#) to resolve all manner of disputes that arise between them has been deplored by this court in a number of decisions. In [Godfrey Paul Okutoyi \(suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya\) v Habil Olaka – Executive Director \(Secretary\) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association\) & another \[2018\] eKLR](#), Mwita J expressed himself as follows on the issue:-

‘It is not every failure to act in accordance with a statutory provision or where an action is taken in breach of a statutory provision that should give rise to a constitutional petition. A party should only file a constitutional petition for redress of a breach of the [Constitution](#) or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum and in the manner allowed by the applicable law and procedure.’

22. In, [Jane Angila Obando v Teachers Service Commission & 2 others \[2020\] eKLR](#), Radido J quoting with approval the case of [Harrikisson V Attorney General of Trinidad and Tobago \[1980\] AC 265](#),



reiterated this point. The often reproduced quotation from the Harikinssoon case on the matter states as follows:-

' The notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by the Constitution is fallacious. The right to apply to the High Court for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action the mere allegation that a human right of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court if it is apparent that the allegation is frivolous, vexatious or abuse of the process of Court as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.'

23. In Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR, the Court of Appeal expressed itself as follows on the issue:-

'The Article 41 rights are enacted in the Employment Act and Labour Relations Act. The two Acts and the rules made there-under 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.'

24. The views expressed above are, in large part, in line with the theory of constitutional avoidance which requires courts to avoid deciding disputes before them on constitutional grounds where the matters can be resolved on the basis of other subsidiary legislation (see KKB v SCM & 5 others (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR)). The Court of Appeal in the Sumayya Athmani Hassan v Paul Masinde Simidi (supra) case has reiterated the point in the following manner:-

' The appellants in this case are seeking to invoke 'the principle of avoidance'; also known as 'constitutional avoidance'. The principle entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.'

25. In my view, the current Petition largely presents the scenario described above. It is an ordinary claim disguised as a constitutional petition. The issues it raises are matters which can easily and properly be addressed by reference to the Employment Act without the need to invoke the Constitution.
26. Importantly, the Petition lacks reasonable particulars of how the Respondent's impugned acts violated the various provisions of the Constitution quoted. The Petition does not therefore satisfy the guidelines of what a constitutional petition should entail as suggested in the case of Anarita Karimi Njeru v Republic [1979] eKLR.



27. I therefore find that the Petition does not raise a constitutional question for determination. I will consequently, address the matter as if it had been filed as an ordinary cause.
28. The second issue to be addressed is whether the termination of the Petitioner's contract of employment was unfair. The law on termination of employment contracts is as largely set out in the [Employment Act](#) (EA). Under section 41 of the Act, an employer may unilaterally terminate a contract of employment on grounds of physical incapacity, poor performance or gross misconduct. However, whenever it is proposed by the employer to terminate the contract of employment on any of the above grounds, he is required to observe the procedure stipulated under the said section of the EA.
29. The employer must: notify the employee of the ground for the proposed termination in a language that the employee understands; allow the employee the opportunity to respond to the accusation against him; hear the employee's witnesses if any; and render a just decision which must be promptly communicated to the employee.
30. The employer is obligated to disclose to the employee the accusations leveled against him in the presence of a co-employee or shop floor union representative of the employee's choice. Ordinarily, the employer should allow an appeal or review process through which the employee will be entitled to have a second look at the employer's verdict. In effect, the employer has a statutory obligation to ensure that the principles of natural justice are upheld in the process leading to the separation of the parties.
31. Whilst section 47 of the EA places on the employee the evidential burden of proving that the termination is unlawful, the employer bears the overall burden of justifying the termination. Importantly, the evidential burden on the employee to prove the unlawfulness of the termination is considered as discharged once an employee presents a prima facie case of the unlawfulness of the decision to terminate.
32. Under section 43 of the EA, the employer shoulders the burden to prove the validity of the decision to terminate an employee's contract of service. In discharging this mandate, the employer must establish two things: that he had valid reason to terminate; and that he observed due process in terminating the employee.
33. With regard to the reason to end an employee's contract of employment, the law recognizes that the employer may have taken the decision based on factors which made him entertain a genuine belief that a valid ground for termination had arisen. Where the totality of the obtaining circumstances would have reasonably invoked a similar reaction in another employer, the court will uphold the validity of the ground to terminate.
34. In the case before me, the reason for terminating the Petitioner was the alleged unsolicited circulation of pornographic materials within the school. That the materials were circulated is not in dispute. This is clear from the content of the affidavits by Milton Ligabo Milimu and Victoria Anne Njeri Shigoli. The deponents to the two affidavits give a detailed account which shows that materials of immoral content were dispatched from an email account bearing the Petitioner's name to the emails of Aristaricus Andalo, Michael Muya Gateru and Pauline Mugo. Some of the emails contain startling pornographic images to say the least.
35. The Petitioner does not deny that the offensive images were indeed circulated or that they were circulated from his email account. What I understand him to be saying is that the images were dispatched through his account after it had been apparently hacked.
36. The Respondent stated that sharing of pornographic literature through the school's official email accounts was prohibited through its e-learning policy. That the Petitioner was not just aware of this e-



learning policy. He had signed and agreed to be bound by it. The e-learning policy was produced as an annex to the affidavit of Milton Ligabo.

37. It is noteworthy that the Petitioner did not dispute the existence of the e-learning policy. Neither did he deny the Respondent's assertion that he had signed and agreed to be bound by the policy.
38. I have looked at the policy. It expressly indicates that transmission of obscene material through the school's online interactive platform is not tolerated. The platform must be used for educational purposes only. Further, all users of the platform are required to secure their usernames by ensuring their passwords are not shared.
39. A scrutiny of the email accounts to which the offensive materials were sent discloses that they were all official emails of Riaru Schools. On the face of it therefore, the materials were shared in contravention of the e-learning policy of the Respondent.
40. It is noted that the offensive emails were first shared on 24th and February 25, 2021. From the evidence presented, the Petitioner's attention was immediately drawn to the first set of images circulated on 24th and February 25, 2021.
41. According to the email by Aristaricus Andalo dated March 1, 2021, the Petitioner was advised to immediately change his password if his account had been hacked. However, despite changing the password, another set of images was circulated from the same email account on February 26, 2021. I have looked at the email images and indeed there is an email from the Petitioner's email address to the official email address of Michael Muya Gateru on February 26, 2021 at 10.14 pm containing nude pictures.
42. The Petitioner confirms the Respondent's evidence that when the issue was first raised with him he visited the Respondent's ICT lab in the company of the Respondent's deputy head teacher where he established that his email was unsecured. As he says, the email account was open. The Petitioner states that following advice that he changes his password, he proceeded to do so.
43. The Petitioner states that the offensive images were transmitted through his email account from the ICT lab. At the time, the Petitioner says he was in class. Therefore, someone other than the Petitioner must have been behind circulation of the images.
44. However, some gaps in the Petitioner's evidence render his account of events incredible. First, the Petitioner confirms that when he visited the ICT lab in the company of the school's deputy head teacher, he realized that his account was not secured. This suggests that the account did not have a functional password. This is unlike a situation where there is a hacker who has managed to get into one's account despite it having a password. In this case and as per the Petitioner's own admission, the account was simply unsecured. From this account, it is clear to me that the Petitioner had either negligently or deliberately left his account susceptible to abuse by third parties. This was in obvious contravention of the Respondent's e-learning policy.
45. Second, it is incredible that after the Petitioner allegedly changed his password on February 25, 2021, the account was still immediately hacked and a fresh set of obscene pictures circulated on February 26, 2021. This development leads to the inevitable conclusion that it may be the Petitioner who may have been manipulating the account.
46. Third, it is noted that the Petitioner says that he reported the hacking to the police immediately he learned of the intrusion. However, the police report he provides shows that the Petitioner first reported the intrusion into his account on March 19, 2021, a day after he had been taken through the Respondent's disciplinary process and terminated. He did not report the issue to the police



immediately it was raised with him on 24th or February 25, 2021. This sequence of events tends to show that the report by the Petitioner to the police may have been a tactical attempt to lay ground for the current Petition. If he thought that it was wise to take up the matter with the police, why did he not do it earlier? Why did he have to wait until after he had been terminated from employment?

47. Another curious thing is that the Petitioner appears to have done nothing about the matter after reporting it to the police. There is no evidence of follow up of the matter with the police leading to the inescapable conclusion that the report to the police may have been intended as a smokescreen.
48. The totality of the evidence before me demonstrates that there was sharing of obscene images through the Petitioner's email account. That the materials were shared with the Respondent's members of staff through their official email addresses. That the sharing was unsolicited. That the sharing was in contravention of the Respondent's e-learning policy which the Petitioner was aware of and had subscribed to. That although the Petitioner alleges that his email account was hacked, there is credible evidence that the account was left unsecured either out of deliberate or negligent conduct of the Petitioner. That there is evidence that the Petitioner may have deliberately sent out further images on February 26, 2021.
49. I am convinced on the basis of the foregoing that the Respondent had genuine grounds to believe that the Petitioner was behind the illicit sharing of the nude pictures in contravention of its e-learning policy. This satisfies the first requirement of section 43 of the EA.
50. The other issue for consideration is whether the Petitioner was accorded due process in the process that led to his release from employment. Sections 41, 43 and 45 of the EA, read together, render due process in terminating an employee a mandatory requirement notwithstanding the grave nature of the infraction that the employee is blamed of. No less than the Supreme Court has emphasized this requirement when in the case of [Gichuru v Package Insurance Brokers Ltd \(Petition 36 of 2019\) \[2021\] KESC 12 \(KLR\)](#), the court stated as follows:-

‘However, grave the circumstances of the employee’s misconduct, he was entitled to be heard before he was dismissed.’
51. The duty is on the employer to demonstrate that he upheld due process in terminating the employee. This position is self evident from the framing of sections 43 and 45 of the EA. Section 43(1) states as follows:-

‘In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.’
52. On the other hand, Section 45 of the EA provides, in part, as follows:-
 - a. No employer shall terminate the employment of an employee unfairly.
 - b. A termination of employment by an employer is unfair if the employer fails to prove:
 - i. That the reason for the termination is valid;
 - ii. That the reason for the termination is a fair reason;
 - iii. That the employment was terminated in accordance with fair procedure.



53. From these provisions, it is clear that the employer bears the burden of establishing that termination of the employee's contract of service was in accordance with fair procedure. Where the employer does not demonstrate this to the satisfaction of the court, the termination will be considered unfair in terms of section 45 of the EA.
54. The evidence on record suggests that the Respondent convened a disciplinary session during which, the question of the alleged gross misconduct of the Claimant was considered. Although the disciplinary committee was to convene on March 10, 2021, it does appear that it may have been held on March 16, 2021. That this session took place is evident from the letter of summary dismissal issued to the Petitioner. This fact is also confirmed by the Petitioner both in the Petition and affidavit in support of the Petition.
55. What is contested is what transpired during the said disciplinary session. Whilst the Petitioner states that he was denied the opportunity to present his evidence before the panel, the Respondent contends that the Petitioner was heard fairly before the decision to terminate his services was taken.
56. Because the right to fair procedure during the disciplinary process against an employee is enshrined in statute, it has been suggested that the employer has a duty to ensure that the process is independently and objectively verifiable. Consequently, it is advisable that the employer documents the process. The conventional way of capturing proceedings of this nature is by taking minutes of the session.
57. Because the Petitioner has contested the fairness of the disciplinary session, the duty lies with the Respondent to demonstrate that the proceedings were conducted in accordance with the requirements of due process. For instance, it is the duty of the Respondent to rebut the Petitioner's assertion that he was denied the opportunity to adduce evidence in his defense during the session by providing evidence to demonstrate the contrary.
58. Whilst the Respondent asserts that it upheld the need for due process when conducting the disciplinary session, it has availed little evidence in support of this assertion. The only document that the Respondent appears to rely on to advance the argument that it conducted a fair disciplinary session against the Petitioner is the letter of dismissal. Unfortunately, this letter does not speak to the issues of grant or denial of the opportunity to the Petitioner to present his evidence at the disciplinary session.
59. In my view, the only reasonable way that the Respondent would have demonstrated that it observed due process in the disciplinary session in line with the dictates of sections 43 and 45 of the EA is by producing minutes of the session for the court's scrutiny. For unexplained reasons, this evidence was withheld from the court. In the absence of this evidence, the court cannot conclude that due process was accorded to the Petitioner in the face of his unequivocal statement that he was denied a chance to call witnesses (see *Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR*).
60. Whilst from the record, it appears clear to me that the Respondent had valid reason to terminate the Petitioner's contract of employment the Respondent has failed to convince the court that it upheld the requirements of due process in terminating him. It is for this reason that I declare the dismissal of the Petitioner unfair.
61. The last issue for determination is whether the parties are entitled to the reliefs sought in their pleadings. In addressing this issue, I will have regard to the provisions of section 49 of the EA. According to the section, the court is required to consider several factors in determining the remedy to grant to the parties. One of the factors to be considered is the conduct of the employee and the extent to which it caused or contributed to the termination.



62. As mentioned in the preceding sections of this decision, circulation of pornographic materials through the Petitioner's email was the reason why his contract of employment was terminated. The court has found that the evidence provided by the Respondent points to the culpability of the Petitioner in circulating these materials to the Respondent's staff community.
63. The images circulated were to say the least startling. The court shudders at the thought of such materials finding their way to the young learners within the Respondent institution. It is shocking that a teacher would find it appropriate to engage in the circulation of such materials particularly in an institution of learning. Such conduct cannot be countenanced by any right thinking member of society including the court. Yet, in deciding the fate of the Petitioner, the Respondent was bound to hear him out fairly.
64. I am not inclined to reward misconduct within an institution of learning. But I am obligated to remedy a wrong in the process of termination of an employee whenever it is pointed out. Having regard to the totality of the foregoing, I will award the Petitioner compensation for wrongful termination on account of failure to accord him a fair hearing notwithstanding his apparent transgressions but limited to an amount equivalent to his salary for two months. I also award him costs of the Petition but to be assessed as an ordinary claim.
65. Summary of the Award
- a. The Respondent's termination of the Petitioner's contract of service is faulted on account of failure to demonstrate that due process was followed.
 - b. The Petitioner is awarded the sum of Kshs 110,000/= being an amount equivalent to his salary for two months as compensation for wrongful termination.
 - c. The Petitioner is granted costs of the Petition. The same to be assessed as costs arising in an ordinary claim.

Dated, signed and delivered on the 26th day of January 2023

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Petitioner

..... for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision 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.

B. O. M MANANI

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