



**Anyasi v Kenya Power and Lighting Co. Limited (Petition  
E146 of 2021) [2023] KEELRC 75 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 75 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E146 OF 2021**

**SC RUTTO, J  
JANUARY 20, 2023**

**IN THE MATTER OF 47 AND 50 AS READ TOGETHER WITH ARTICLES  
22, 23, 25, 27, 28, 258, & 259 OF THE CONSTITUTION OF KENYA 2010  
AS READ WITH THE FAIR ADMINISTRATIVE ACTION ACT AND  
EMPLOYMENT ACT UNDER UNFAIR LABOUR PRACTICES AND  
CONTRAVENTION OF ARTICLES 10, 41, D ADMINISTRATIVE ACTIONS.**

**BETWEEN**

**BOB OLIVER ANYASI ..... PETITIONER**

**AND**

**KENYA POWER AND LIGHTING CO. LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The petitioner is a former employee of the respondent, having been employed as a Supply Chain Support Assistant with effect from August 17, 2015.
2. The respondent is a public utility company within the Ministry of Energy with the mandate to engage in bulk purchase, transmission, distribution and rental supply of electricity. The respondent further describes itself as a commercial state corporation and a public limited company.
3. The petition which is supported by the affidavit sworn on September 17, 2021, by the petitioner seeks the following orders:
  - a. A declaration that the petitioner's rights to a fair hearing, fair labour practices and fair administrative action under articles 41, 47 and 50 of the [constitution](#) were and have been violated by the respondent in the process of his dismissal and termination.



- b. A declaration that the dismissal and termination of the petitioner by the respondent was unfair and unprocedural, null and void and order for immediate reinstatement with all accrued benefits.
- c. Damages for breach and violation of the petitioner's fundamental and constitutional rights.
- d. Costs and any other relief orders deemed suitable.

### **Petitioner's Case**

4. It is the petitioner's case that his duties included among others, issuance and receipt of store materials to staff and contractors. That on February 6, 2018, in the course of his work, he issued a meter offline to one Nelson Gichu which was recorded in the security meter book under work order to be posted later when the system became stable. That on July 22, 2020, he was issued with 72 hours ultimatum to show cause for the issuance of the meter offline to Nelson Gichu.
5. The petitioner further avers that he responded to the show cause letter on July 23, 2020 by stating that the meter was issued offline because the INCMS system was unstable and that Nelson Gichu who was the officer in charge of customer service had issued a work order number 576079 and had stated that it was for emergency purpose and committed by signing the security meter record book undertaking to have it posted when the system was restored.
6. That on July 29, 2020, he was invited to attend a disciplinary hearing on August 5, 2020 and was only given three working days' notice to travel from Voi to Nairobi. That he was unable to get any documents or witnesses for his defence including his immediate supervisor who he later obtained her statement absolving him at appeal but the same was not considered.
7. That on 26<sup>th</sup> August, he was summarily dismissed by the respondent for issuing the meter offline in uprating of single phase line to three phase line. That the letter did not state the company regulations or code of conduct he had breached. That instead, it quoted clause 25 of the Collective Bargaining Agreement which was not applicable to him as he was not a member of the union.
8. That on September 9, 2020, the petitioner appealed against the dismissal and the same was acknowledged by Faith Kaberenge, one of the panelists in the disciplinary hearing. That he appeared for the appeal hearing on January 25, 2021 and the officer in charge of the audit department, George Mbaabu was a panelist and fully participated in the plenary deliberations while he was supposed to appear as a witness. That his appeal was dismissed and he was informed as much through a letter dated April 7, 2021.
9. The petitioner contends that the process leading up to his dismissal was unfair, did not conform with international labour practices on fair hearing and disciplinary procedures, was wrongful, unlawful, tainted with illegality, breach of law, biased, violated the tenets of the constitution and fair administrative action and was wholly procedurally defective as he was deemed culpable and guilty of misconduct until proven innocent.
10. That what was before the disciplinary committee was a broad amorphous charge without particulars, information and material evidence to back the charge for a fair hearing. That the Human Resource Manual or Code of Regulations or Ethics upon which the charges were based was not disclosed to him to allow him interrogate the same. That the procedures violated in issuance of the materials offline to Nelson Gichu was not elaborated to allow him consider the same.



11. The petitioner further avers that the three days' timeline issued to him was unreasonable, short and unconstitutional. That no investigation report, particulars, information and nature of the charges were particularized and substantiated to enable him prepare for his defence.
12. That further, the alleged Nelson Gichu and a key material witness to the charge was not summoned to substantiate and did not record any evidence implicating him.
13. He further contends that the composition of the disciplinary committee including the auditor was unfair and irregular as he was likely to be a witness. That both the disciplinary and appeal did not address the defence issues and ignored his response.

### **Respondent's Case**

14. The respondent opposed the petition through the Affidavit of Emily Kirui who described herself as a legal officer in the employ of the respondent. Ms Kirui avers that the petitioner's employment contract clearly stipulated that he was to adhere to the obtaining laws, regulations and the respondent's code of conduct and or policies. That article (b) of the respondent's Code of Conduct and Ethics addresses the issue of bribery, corruption and fraud.
15. That sometimes in July, 2020, an audit investigation report no 14-2019/2020 on Fraud in Powerline Uprating and Contracting of Accounts, revealed that the petitioner was involved in fraud by issuing meter no 062241158 offline without any valid approval and this was against the respondent's laid down procedures. That the issued meter was installed to an illegal three phase uprate for the respondent's customer.
16. That as a result of the investigation, it was established that the respondent's security department recovered a three phase meter no 54160120157 from a customer, Mr Gardiel Mnyambo Maganga whose supply was illegally uprated to a three phase supply. That the meter to regularize the illegal uprating, meter no 062241158 was installed. That it failed to function as it could not be commissioned while in the status of "stored". That subsequently, another meter was sourced irregularly from the respondent's Limuru store.
17. That the respondent has been facing major challenges on the issue of illegal connection which has resulted into huge commercial losses hence its internal audit department was tasked with carrying out an enquiry to identify the control weaknesses in the process by reviewing connection and contracting process and documentation for the installation. That it is without doubt that the petitioner was involved in the fraudulent transaction to the detriment of the respondent. That the petitioner issued meter no 062241158 offline to Mr Nelson Gichu and this was irregular since verification from the stores register established that all the meters issued on the same day were posted in the system except meter no 062241158.
18. That the petitioner's actions amounted to engaging in corrupt practices and unethical behaviour. That he had thus failed to maintain public confidence and integrity in his office and failed to act honestly, in a transparent and accountable manner. That his actions amounted to gross misconduct in line with the respondent's Code of Conduct as well as section 44 (3&4) of the *Employment Act*, 2007.
19. Ms Kirui further stated that the petitioner's response to the show cause was found to be unsatisfactory hence he was invited for a disciplinary hearing. That the petitioner was granted sufficient and ample time to answer to the charges against him. That he was accorded a fair hearing as provided by the law and his explanation was unsatisfactory hence his dismissal. That the petitioner was further afforded an opportunity to appeal and produce new evidence. That the appeal committee found that the evidence produced by the petitioner did not exonerate him hence his dismissal was upheld.



20. The respondent contends that it followed due process prior to terminating the petitioner's employment. That further, the petitioner had several incidences of indiscipline in the discharge of his duties. That his dismissal was therefore justified.

### **Petitioner's Submissions**

21. The petition was canvassed through written submissions. The petitioner submitted that no evidence was supplied at the plenary disciplinary hearing to implicate him on the fraudulent activity of issuance of the meter. That failure to issue the petitioner with the audit report to enable him prepare his defence amounted to violation of his right to a fair hearing and Fair Administrative Actions Act under articles 47 and 50 of the Constitution. In support of the petitioner's submissions, the cases of Ruth Adhiambo Apindi vs Unilever Kenya Limited (2015) eKLR, David Wanjau Muhoro vs Olpajeta Ranching Limited (2014) eKLR and Said Dingo Nyondo vs Kwale Waters & Sewerage (2020) eKLR were cited.
22. The petitioner further submitted that the auditor John Tolla, despite being a likely witness turned into being one of the panelists and not a witness. That he became a judge in his own cause by questioning the petitioner rather than being questioned on his report. To this end, reliance was placed on the case of Fred Oboye vs Judicial Service Commission (2022) eKLR.
23. In further submission, the petitioner stated that the fraud charge in itself was too general without specific particulars, information materials and evidence. That further, the 72 hours issued to show cause and three days' notice to prepare and appear before the disciplinary committee was unreasonable, short and unconstitutional. To buttress this argument, the petitioner cited the case of Obuya Bagaka vs Kenya School of Government (2021) eKLR.

### **Respondent's Submissions**

24. On its part, the respondent submitted that it had reasonable grounds for suspecting and concluding that the petitioner had committed an offence which was fraudulent in nature, to its financial detriment. To support this position, the respondent placed reliance on the case of CFC Stanbic Bank Ltd vs Danson Mwashako Mwakuona (2015) eKLR. The respondent further submitted that the termination was in consonance with fair procedure. That the petitioner was informed of the charges against him, to which he explained himself. On this score, the respondent made reference to the cases of Dairus Kiseu Mwamburi vs Cooperative Bank (2021) eKLR and Kenya Union of Commercial Food and Allied Workers vs Meru North Farmers SACCO Limited (2013) eKLR.

### **Analysis and Determination**

25. The issues for determination can be distilled as follows:
- a. Whether the petitioner's Constitutional rights were violated.
  - b. Whether the petitioner is entitled to the reliefs sought.

### **Constitutional Violation?**

26. The petitioner has cited the respondent for constitutional violation and specifically, has flagged articles 41,47(2), 50 and 10 of the Constitution.
27. The petitioner has argued that the time he was given to respond to the show cause letter and attend the disciplinary hearing was short and unreasonable hence violated his right to a fair hearing under articles 47 and 50 of the Constitution. The petitioner further argues that the conduct of the disciplinary



hearing without substantiating the charge, calling witnesses, laying information and particulars of the charge, violated his right to a fair hearing.

28. Article 47 of the Constitution guarantees the right to fair administrative action. It provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In addition, it provides that where an administrative action is likely to adversely affect a person, such person is entitled to be given written reasons for the action.
29. On the other hand, article 50 of the Constitution guarantees the right to fair hearing and provides that every person has the right to have any dispute that can be resolved by the application of the law, to be decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
30. In the instant case, the petitioner was issued with a show cause letter through which he was required to render an explanation within 72 hours (three days) with regards to issuing meter no 62241158, offline to one Nelson Gichu. The petitioner has termed this period as unreasonable and short. It is notable that the Court was not furnished with any manual or such other documentation providing for the time frame within which such a response ought to have been made. Further, what constitutes a reasonable timeframe varies from case to case. As such, there is no standard timeframe.
31. Notably, there is no evidence that the petitioner requested for more time to allow him respond to the show cause letter. If anything, the petitioner submitted a further explanation dated August 3, 2020 in addition to the one he had submitted on July 23, 2020. Seemingly, he was able to respond to the allegations raised in the show cause letter and if at all he considered the time given to respond as being too short, then there is no evidence that he indicated as much to the respondent. The same case applies to the time given for him to attend the disciplinary hearing.
32. Further, if on the date of the disciplinary hearing, the petitioner was not prepared to proceed, he would have asked for more time. There is no evidence that he did as much hence the respondent cannot be faulted to that extent.
33. The petitioner has further, argued that the charges against him were too general and amorphous and without particulars. This does not seem to be the case as the show cause letter provided the specific meter number, the petitioner was accused of issuing offline. The show cause letter further stated the person to whom the meter was issued to, being Mr Nelson Gichu. In addition, he was further informed of the fact that the said meter was used to uprate a single phase line to three phase at Mr Gardiel Maghanga's residence. In my view, these particulars were sufficient for the petitioner to comprehend the nature of the accusation leveled against him. Indeed, he was able to respond to the same in a specific manner as he stated that he issued the meter offline as the INCMS system was unstable and that the said Nelson committed by signing the meter record book on understanding that the same would be posted later when the system was restored. Therefore, it is not accurate for the petitioner to state that the charges were too general and lacked particulars.
34. The petitioner has further cited the respondent for not issuing him with the audit report and other evidence to allow him defend himself. The petitioner has not indicated, let alone suggest that he requested for evidence either before or during the hearing but the same was withheld by the respondent.
35. The petitioner further averred that John Tolla and George Mbaabu sat in the disciplinary and appeal panel respectively whereas they were meant to be witnesses, having prepared the audit report. It is noteworthy that the audit report was signed by Charles Cheruiyot and not John Tolla or the said George Mbaabu.



36. Further, at the end of the disciplinary hearing, the petitioner was notified of the reasons for his dismissal being that he issued the meter offline to Mr Nelson Githu. He was therefore aware of the reasons behind the administrative decision by the respondent.
37. All in all, the petitioner was given an opportunity to be heard in the various stages of the disciplinary process and he did not raise any issue regarding the reasonableness of the time afforded to him, access to evidence and composition of the disciplinary and appeal panels which notably, were differently constituted. To that extent, I am unable to fault the respondent with regards to the process it applied in terminating the petitioner.
38. Over and above, it is notable that the petitioner has admitted issuing the meter in question offline, to the said Nelson Gichu. As it would be, the same was used to undertake an illegal uprating. Further, he admitted during the disciplinary hearing that was not authorized to issue meters offline and that the same could only be done with authorization from the Regional Manager. There was no evidence in this case, that he had the said authority.
39. As I suppose, the system existed for purposes of tracking the issuance of the items from the stores. Ideally this is meant to prevent pilferage and enhance accountability. By issuing the meter offline thus circumventing the system, the petitioner occasioned a gap and as it turned out, the meter was used in an illegal uprating.
40. The total sum of the foregoing is that the petitioner has not demonstrated the manner in which the respondent violated his constitutional rights as alleged.
41. Before I pen off on this issue, I find it imperative to mention that this petition brings to the fore the doctrine of constitutional avoidance. On this score, I find useful guidance in the decision by the Supreme Court of Kenya in *Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others* [2014] eKLR where it was held that:

“The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

42. Further, in the case of *Gabriel Mutava & 2 others vs Managing Director, Kenya Ports Authority & another* (2016) eKLR, the Court of Appeal held that:

“Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation... Of course, Violations of constitutional rights may nonetheless be different, and more serious than the Violations of statutory or contractual rights. There is no clear demarcation however, where one Violation begins and ends, and when one violation should attract desperate remedies. In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except



to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. The Constitution should not be turned into a thoroughfare for resolution of every kind of common grievance...In saying all these, we are not oblivious to the fact that a party is entitled to sue under the Constitution even if there is an alternative remedy, and or other mechanism for the resolution of the dispute. However, it has since emerged on the authorities that constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional Litigation is not a panacea for all manner of litigation, we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.”

43. In light of the foregoing, I am of the firm view that this was a case that would have been well articulated through a memorandum of claim for unlawful termination under the Employment Act, 2007 as opposed to a constitutional petition.
44. As I have found that the petitioner has not disclosed any constitutional violation, the remedies he seeks cannot issue.

#### **Orders**

45. In the end, I find that the petition is not merited and is accordingly dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF JANUARY, 2023.**

**STELLA RUTTO**

**JUDGE**

Appearance:

Mr. Nyende for the petitioner

Ms. Walala for the respondent

Court Assistant Abdimalik Hussein

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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 Civil 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.

