



**Kataka v Attorney General & 2 others (Petition 40 of 2018)
[2023] KEELRC 31 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 31 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION 40 OF 2018
CN BAARI, J
JANUARY 19, 2023**

BETWEEN

PETER KATAKA PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

KENYA NATIONAL POLICE SERVICE 2ND RESPONDENT

KAKAMEGA COUNTY GOVERNMENT 3RD RESPONDENT

JUDGMENT

1. The Petition herein, is dated March 23, 2018. The Petitioner seeks the following reliefs:
 - a. A declaration that his arrest and arraignment in court in criminal case number 102 of 2015, had no legal basis, was malicious and infringed the Petitioner’s rights to liberty, privacy, economic and social rights and to equal protection of the law as well as the guaranteed right to freedom granted under Articles 29, 31 and 39 of the Constitution.
 - b. A declaration that the Respondents violated the Constitutional rights of the Petitioner under Article 41.
 - c. An order finding the Respondents liable to pay general damages to the Petitioner for violating his constitutional rights under Articles 29, 31 and 39 of the Constitution.
 - d. An order finding the Respondents liable for special damages as follows:
 - i. Special damages 585,945.00 plus future loss at Kshs 5,000.00 per a month.
 - ii. General damages for violation of Constitutional rights under Article 41 of the Constitutional of Kenya.



- iii. An order for payment of costs to the Petitioner.
2. The petition is premised on the grounds that: -
- i. The Petitioner was employed by the Central Government as an instructor and in 2014, he was working as an instructor of a youth polytechnic under the Ministry of Education, Science and Technology.
 - ii. The Petitioner avers that during the implementation of the 2010 *Constitution*, the Government had to do some re-organization of its services and as a result, the services offered by the Petitioner were transferred to County Governments.
 - iii. The Petitioner avers that he was working at Kisumu as an instructor but was later transferred to Kakamega County in the same capacity.
 - iv. The Petitioner realized on July 21, 2014 that he had received double salary in the months of March, April, May and June 2014, and did address the issue with the Permanent Secretary Ministry of Education, Science and Technology.
 - v. The Petitioner and other staff were arrested and charged with the offence of stealing by a person employed in the Public Service contrary to the Penal Code Chapter 63 of the Laws of Kenya.
 - vi. The Petitioner was arraigned in court on 13/1/2015 in Criminal Case Number 102 of 2015, and continued with the case until October 11, 2016, when the Petitioner was acquitted under Section 202 of the *Criminal Procedure Code*.
 - vii. The Petitioner avers that he had to suffer the indignity of charges read to him and the troubles of abandoning his duties each time the case came up for hearing and as a result his liberty was restrained.
 - viii. The Petitioner had to spend money in Legal charges, transport and subsistence during hearings which the Petitioner claims
 - ix. That as a consequence of the charging, the Petitioner's salary was reduced by half, and never received the remaining half when the criminal case was determined. The Petitioner suffered loss during the presentation of the Criminal case and continues to suffer to date.
 - x. The losses include:
 - i. Hiring a lawyer =150,000.00
 - ii. Subsistence during hearing =10,000.00
 - iii. Salary deductions =425,945.00Total 585,945.00
 - xi. The Petitioner continues to be deducted by the 3rd Respondent a sum of Kenya Shillings 5,000.00 and the Petitioner will pray that he gets compensated the further deductions of Kenya Shillings 5,000.00 per a month from February, 2018.
 - xii. The Petitioner avers that he has demanded that the 3rd Respondent pays him this deduction occasioned in his salary but the 3rd Respondent has remained non-communicative.
 - xiii. The Petitioner avers that the behavior of the 1st and 2nd Respondents have occasioned him loss of his rights under the Bill of rights and more specifically his Constitutional rights guaranteed



under Articles 19, 21, 22, 23, 25, 27, 29, 31, 47, 48, 49, 50 and 51 of the Bill of rights, and claims damages for the violation.

- xiv. The Petitioner avers that there is no case pending in any court of competent jurisdiction between the parties herein.
3. The Respondents replied to the petition through two sets of grounds of opposition, one filed on April 4, 2022, for the 3rd Respondent and another of May 6, 2022, filed for the 1st, 2nd and 3rd Respondents. The respondents' case is that:
- i. The Petitioner in his own admission, acknowledged to have received double salary for the months of March, April, May and June, 2014 totalling to Kenya Shillings 489,100.00
 - ii. The Petitioner was arrested and charged with "stealing by servant" in criminal case 102 of 2015 and that at no point were his fundamental rights and freedoms violated under Article 29, 31 and 39 of the [Constitution of Kenya 2010](#).
 - iii. The Petitioner's freedom was only limited at the point of his arrest, which was within the law under Article 24 of the Constitution of Kenya 2010; that a right may be limited only to the extent that such is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, considering all relevant factors.
 - iv. That at no point was the Petitioner's arraignment in court with no legal basis, malicious and infringing on his rights to liberty, privacy, economic and social rights and to equal protection of the law and rights granted in the [Constitution of Kenya 2010](#).
 - v. That the Petitioner's rights under Article 41 of the [Constitution of Kenya 2010](#) were never violated at any material time.
 - vi. That Section 62 of the [Anti-Corruption and Economic Crimes Act](#) No. 3 of 2003, provides that a public officer or a State Officer charged with corruption or economic crime shall be suspended at half pay, with effect from the date of the charge until the conclusion of the case.
 - vii. The Respondents aver that there is no cause of action against the Respondents herein, and therefore no prima facie case with a high chance of succeeding, has been established by the Petitioner to warrant the issuance of the orders sought.
 - viii. The prayers sought are misconceived as the said undated Petition is not a form to plead and/or bring the prayers sought as it contravenes the mandatory provisions of the Civil Procedure Rules, 2010, read together with the Constitution and thus the same should be dismissed with costs.
4. Parties canvassed the petition by way of written submissions. All parties filed submissions, save to say that the Petitioner's submissions on record were filed on December 14, 2021 and no new submissions were filed after the court issued directions.



The Petitioner's Submissions.

- i. The Petitioner submits that he has proved that his Constitutional rights were violated by the Respondents by causing his arrest and subjecting him to trial.
- ii. It is the petitioner's submission that as a result of the arrest, his freedom was restrained arbitrarily and without cause, and his rights under Article 31 of the Constitution violated.
- iii. The Petitioner submits that the charges against him were not proved in court and no effort was made to adduce evidence, hence the action was malicious as the Respondents knew that the Petitioner had not committed any offence.
- iv. The Petitioner further submits that the action of the 3rd Respondent making deductions from his salary violated Articles 31 and 41 of the Constitution for failure to adhere to due process.
- v. The Petitioner submits that his right to fair administrative action protected under Article 47 of the Constitution was infringed upon having attended court variously with no witness appearing to testify against him.

Submissions by 1st 2nd and 3rd Respondents

- vi. It is submitted for the Respondents that the Petitioner was arrested on his own admission of having received double salary for the months of March, April, May and June 2014, amounting to Kenya Shillings 489,100.00, contrary to Article 75(1) of the Constitution which requires him as a public officer to behave in a manner that does not compromise any public or official interest. The Respondents sought to rely in Dickson Chebuye Ambeyi v National Police Service & Another; Peter Sifuna Wesonga & Another (Interested Parties) [2020] eKLR cited in the case of Patrick Nyamuke Etori vs. National Police Service Commission & 2 others [2019] eKLR where the court held that for one to establish a case for malicious prosecution, he must prove that the prosecution had no legal basis and that it was actuated by malice.
- vii. The Respondents further submit that the Petitioner's freedom was only limited at the point of his arrest, which was within the law under Article 24 of the Constitution of Kenya 2010, that a right can be limited only to the extent that such is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom, taking into account all relevant factors. They placed reliance in the holding in Robert Alai v, the Hon. Attorney General & Another [2017] eKLR.
- viii. The Respondents further submit that Section 62 of the Anti-Corruption and Economic Crimes Act No 3 of 2003, demands that public officers charged with corruption or economic crimes be suspended, at half pay with effect from the date of the charge, until the conclusion of the case.
- ix. It is finally submitted for the Respondents that there is no cause of action against them raised in the Petition to warrant issuance of the orders sought, and pray that the petition be dismissed.

Analysis and Determination

5. I have carefully considered the petition, the Respondents' grounds of opposition and the submissions by the parties. The issues for determination are:
 - i. Whether the Petitioner's rights were violated; and



- ii. Whether the Petitioner is entitled to the remedies sought.

Whether the Petitioner's rights were violated**

6. It is now settled that this court is clothed with power to enforce employment and labour rights, as well as interpret the Constitution on matters that fall within its jurisdiction. In *Daniel N Mugendi v Kenyatta University & 3 others* [2013] eKLR the court had this to say: -

“.....the Employment and Labour Relations Court has jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the Constitution and fundamental rights and freedoms, incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of Section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce, not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within the matter before it.”

7. The Petitioner's contention is that his rights under Articles 19, 20, 21, 22, 23, 25, 27, 29, 31, 41, 48 and 49 of the Constitution were violated. Specifically, the Petitioner asserts that his right to privacy under Article 31(b) of the Constitution was violated by the Respondents seizing his salary without following due process. It is his further assertion that deducting his salary without any explanation violated his right to fair labour practices enshrined in Article 41 of the Constitution.
8. The Petitioner further contends that his appearance and continued attendance before court in the time his criminal case was before court, offended his right to Fair Administrative Action protected under Article 47.
9. The Respondents on their part argue that there was legal basis to charge the Petitioner having admitted receiving double salary in four consecutive months, and failing to inform the Ministry/employer. It is their contention that the charges levelled against the Petitioner were not malicious.
10. In the case of *Mbowa vs. East Mengo Administration* [1972] EA 352, also cited by the Respondents, the court had this to say on malicious prosecution: -

“The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit... It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings ... It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth.”

11. The question that begs answer, is whether there exists a trace of malice in the way Criminal Case No. 105 of 2015, against the Petitioner came to be. The charge against the Petitioner was that of stealing by a person employed in the Public Service.
12. The Petitioner in paragraph 7 of his petition states thus:

“That the Petitioner realized on 21/7/2014 that he had received double salary in the months of March, April, June 2014, and did address the issue with the Permanent Secretary Ministry of Education, Science and Technology.”



13. The discovery that the Petitioner received double salary, resulted in an investigation and subsequently charges against the Petitioner on the January 13, 2015. No evidence was led to show that the Petitioner informed his employer about the double payments.
14. In my view, the admission by the Petitioner that he received double salary in four consecutive months, and in the absence of evidence that he informed the Respondents about the anomaly, is prove that there was reasonable or probable cause for the Respondents and the prosecution to genuinely believe that the criminal charges against the Petitioner were justified.
15. I therefore find no malice in the criminal proceedings against the Petitioner and his rights in this regard were not violated.

Whether the Petitioner is entitled to the reliefs sought.**

16. The Petitioner's prayers to this court is that his arrest and arraignment in court in criminal case number 102 of 2015 had no legal basis, and infringed on his rights to liberty, privacy, economic and social rights guaranteed under Articles 29, 31 and 39 of the *Constitution*, an award of general damages for violation of the rights herein stated, and special damages in the sum of Kshs 585,945.00 being cost of hiring a lawyer, subsistence allowance and salary deductions.
17. The prayers on awards premised on violation of the Petitioner's rights collapse on the finding that no rights were violated.
18. On the issue of deduction of salary, the amount deducted from the Petitioner's salary is Kshs 489,100.00. This in my view is in recovery of the double salary paid to the Petitioner in the months of March, April, May and June, 2014.
19. That the Petitioner was acquitted does not in my opinion entitle him to benefit from public coffers. Whether the Petitioner obtained the double payment fraudulently or through the employer's inadvertence/mistake, the amount overpaid is a debt owed to the employer and which is recoverable from the Petitioner's salary.
20. I hold that the Petitioner is not entitled to the amount deducted.
21. In the upshot, I conclude by holding that the petition herein does not disclose violation of the Petitioner rights and is dismissed in its entirety with no orders as to costs.
22. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 19TH DAY OF JANUARY, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

N/A for the Petitioner

N/A for the Respondents

Christine Omollo- C/A

