



Republic v Kenya Airports Authority; Waweru (Exparte Applicant) (Judicial Review Application 11 of 2018) [2023] KEELRC 1314 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1314 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW APPLICATION 11 OF 2018**

B ONGAYA, J

MAY 25, 2023

IN THE MATTER OF SECTIONS 41, 43, 44, 45, 47, 49, 50, 51, 90, OF THE EMPLOYMENT ACT CAP 226; SECTION 3, 4, 7, 8, 9, 10, 11, 12 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015; RULE 7 (1) (2) & (3) OF THE EMPLOYMENT AND LABOUR RELATIONS COURT (PROCEDURE) RULES, 2016, AND ARTICLES 22, 23, 24, 27 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

REPUBLIC APPLICANT

AND

KENYA AIRPORTS AUTHORITY RESPONDENT

AND

JOHN KARIUKI WAWERU EXPARTE APPLICANT

JUDGMENT

1. The *ex-parte* applicant is John Kariuki Waweru. He filed a notice of motion on June 4, 2018 through KBN Associates. The application was brought under Order 53 Rule 3(1) of the [Civil Procedure Rules](#), Section 8 and 9 of the [Law Reform Act](#) Chapter 26, [Constitution](#) of Kenya 2010 and all other enabling provisions of law, and, pursuant to leave of Court granted on May 11, 2018. The application was based on the *ex-parte* applicant’s verifying affidavit, the exhibits thereto, the statutory statement and the applicant’s further affidavit sworn on April 28, 2023.
2. The applicant prays for orders:
 - a) An order of mandamus directed at the respondent to compel them to reinstate the *ex-parte* applicant to his work place and position.



- b) An order of prohibition directed at the respondents from subjecting or harassing the *ex-parte* applicant on ground of race, tribe, and association with the Kenya Aviation Worker’s Union (Trade Union).
 - c) An order of certiorari directed at the respondent to quash the decision dated May 2, 2018 barring or terminating the *ex-parte* applicant’s employment.
 - d) An order of mandamus directed at the respondent to pay the *ex-parte* applicant his salary for the months worked and the subsequent months pending hearing and determination of his suit.
 - e) An order to restrain the respondent from acting or continuing to act in breach of duty imposed upon them by law or from acting or continuing to act in any manner that is prejudicial to legal rights of the *ex-parte* applicant.
 - f) An order directing the respondent compelling them to undertake public duty owed in law and in respect of which the *ex-parte* applicants have a legally enforceable right and legitimate expectation.
 - g) An order directing the 1st and 2nd respondents compelling them to undertake public duty owed in law and in respect of which the *ex-parte* applicants have a legally enforceable right and legitimate expectation.
 - h) An order that leave do operate as a stay pending the hearing
 - i) And determination of the application.
 - j) Any other order necessary in the interest of justice.
 - k) The costs of the application.
3. The grounds in support of the application are as follows:
- a) The applicant was employed by the respondent on February 2, 2004 as a security trainee.
 - b) On March 7, 2018 the applicant was on duty as assigned when he was viewing bags going through the x-ray machine and did not see any bag carrying miraa thus to that effect is being terminated from his job.
 - c) He attended before the disciplinary committee as summoned but an adverse decision was made to terminate him by a selection of individuals without the input of the other attendees like union members. The respondent based the decision on minutes which bare forged signatures and not for the actual parties who attended the proceedings.
 - d) The respondent declined to issue the *ex-parte* applicant with the investigation report relied upon to terminate his services. He was terminated unlawfully without a fair hearing. The summary dismissal was on May 2, 2018. the respondents acted capriciously, maliciously and in disregard of its own statutes, *Fair Administrative Action Act*, 2015 and the *Employment Act*. The decision to dismiss was had glaring errors of fact and arrived at a conclusion that was unsupported by evidence. The material error of fact makes the dismissal decision ultra vires and the Court should intervene.
4. The respondents have not participated in the proceedings. On May 11, 2018 the Court ordered thus, “7. The substantive motion for judicial review orders be filed and served within 14 days from today”. The record shows that the motion was filed belatedly on June 4, 2018 and there is no evidence on record to show that it was ever served. The matter was listed on April 20, 2023 for notice to show why



it should not be dismissed for want of prosecution. Counsel for the applicant informed Court that he had served and filed an affidavit of service. However, it turns out that there is no such affidavit of service of the notice of motion on record. There is also no affidavit of service to show that the material on record initiating the proceedings at the leave stage were ever served. In any event the applicant filed the substantive motion belatedly without leave of Court. The Court finds that in the circumstance, the notice of motion is being prosecuted in disregard of the provisions of Order 53 of the Civil Procedure Rules on service and in total disregard of the orders given by the Court at the leave stage on filing and service of the motion. The proceedings are therefore found liable to striking out as the notice of motion is an abuse of Court process.

5. In any event, the Court has considered the applicant's affidavits on record. They show that the applicant was accorded due process of show cause notice, he replied, he attended the disciplinary hearing with his trade union representatives, he was found culpable, he was dismissed, he appealed but the appeal was disallowed. The Court finds that all steps consistent with rules of natural justice and section 41 of the Employment Act on notice and hearing prior to dismissal on account of misconduct were complied with.
6. Further, the applicant appears to suggest that the reasons for termination were not valid as per section 43 of the Employment Act. However, he has exhibited the internal memo dated September 25, 2019 being a brief about his disciplinary case. The exhibit is on his further affidavit sworn on April 23, 2023. It shows that beyond reasonable doubt he was culpable of the levelled allegations being facilitation of transportation of miraa but which was prohibited. It is true that the disciplinary committee recommended imposition of a Final Warning but it is also true that the General Manager HRD recommended to the Managing Director or CEO that the applicant's services be terminated based on the magnitude of the involvement in the case reported against him. The applicant's contract of service was therefore terminated and he appealed on June 5, 2018 stating that the CCTV coverage that was played did not implicate him at all. He also stated that he wanted the investigators and the disciplinary committee to disclose to him the owner of the bags that had the miraa but that was not done. The appeals committee found that the CCTV clips in fact implicated the applicant. Further similarly implicated officers but who had been transferred ought to have been subjected to similar punishment of dismissal. In a contradictory manner, the same brief states that the applicant's implication was only circumstantial and that the appeals committee recommended that his termination be revoked and he be reinstated. The Court considers that such contradictory account cannot be relied upon to challenge the termination or dismissal decision. On a balance of probability, the applicant was culpable and upholding of the termination decision in the whole analysis cannot be faulted at all.

In conclusion and for the stated reasons, the notice of motion for judicial review orders herein is dismissed with no orders on costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 25TH MAY, 2023.

BYRAM ONGAYA, PRINCIPAL JUDGE

