



Ndegwa v Office of the Director of Public Prosecutions & another (Petition 95 of 2019) [2023] KEELRC 1557 (KLR) (21 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1557 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 95 OF 2019
MA ONYANGO, J
JUNE 21, 2023**

BETWEEN

DAVID MUTHUI NDEGWA PETITIONER

AND

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. The Petition herein was filed on 12th June 2019. The Petitioner filed an amended petition dated 20th April 2022 in which he seeks the following orders:
 - a. A declaration that the Petitioner’s right to fair labour practices has been violated.
 - b. A declaration that the Petitioner’s right to fair administration action has been violated.
 - c. A declaration that the Respondent has breached and violated the internal rule and regulation under the ODDP Human Resource Manual
 - d. A permanent injunction restraining the Respondent from further harassing the petitioner or conducting and continuing with the unending disciplinary action now on its fourth year.
 - e. An order compelling the Respondent to reinstate the Petitioner to his position of duty with full benefits and status of the current office holder.
 - f. An order compelling the Respondent to pay all the half salary withheld with interest at (18%) eighteen per cent per annum from the date commencing after 10th June 2016 to date
 - g. Payments of exemplary damages for period of over three months and thereafter when the period of interdiction should have ended.



- h. An order compelling the Respondent to pay all the Petitioner's allowances withheld from the 10th June 2016 to date in full.
- i. Any other damages or compensation which this court may deem just and fair to grant as a result.
- j. Costs to be provided for.

The Petitioners' Case

- 2. The Petitioner's case is that he was employed on 3rd June 2008 by the Office of the Attorney General and deployed to the Department of Public Prosecutions as a Clerical Officer II job group "F". He was promoted to job Group "G" and later again promoted to Senior Clerical Officer Job Group "H" on 23rd June 2014. After the promulgation of the Constitution of Kenya 2010, the Department of Public Prosecutions was delinked from the Office of the Attorney General and became an independent office under the 1st Respondent. He was deployed to the Supply Chain Management Division, as the officer in charge of stores and the custodian of the store and all assets therein at their then offices at NSSF Building.
- 3. The Petitioner states that on 6th June 2016, he reported the loss of government property within the store where he was deployed and working with others and consequently a letter to show cause why disciplinary action should not be taken against him was issued to him without notice. This was followed by an interdiction vide a letter dated 10th June 2016.
- 4. The Petitioner avers that he has been on interdiction since then, a period over two (2) years from 6th June 2016 to date of filing suit. That while on interdiction he has been receiving only ½ of his basic salary of Kshs. 18,638 or thereabouts.
- 5. The Petitioner states that he responded to the notice to show cause vide letter dated 23rd June 2016 explaining the circumstances under which the losses in the store occurred.
- 6. The Petitioner states that he was arrested and released, and was never charged with any offence even after the matter had been reported to the police; that the alleged investigations have taken too long without any conclusive report and as a result the Petitioner continues to suffer indefinitely without definite period as to when the investigations would be concluded.
- 7. The Petitioner states that he has written severally to the Director of Public Prosecutions requesting for update on the disciplinary action to no avail.
- 8. The Petitioner avers that the 1st Respondent has commenced the process of surcharging the Petitioner without even informing the Petitioner of the outcome of the alleged disciplinary process and that the decision to surcharge him was shrouded in secrecy as he was not afforded an opportunity to be heard. He further avers that he has been reporting once a month to the 1st Respondent's offices where he signs the office register which action according to the Petitioner amounts to him serving an illegal outside sentence or conviction supervised by the 1st Respondent.
- 9. The Petitioner avers that the actions of the Respondent have deprived him the enjoyment of his constitutional rights to fair administrative action and labour practices contrary to the Constitution.

The 1st Respondents' Case

- 10. The 1st Respondents filed a Replying affidavit in response to the petition on 8th August 2019 sworn by Monica Mburugu, the Senior Assistant Director of Public Prosecutions. In the affidavit, the deponent



states that the Petitioner is seeking orders restraining the 1st Respondent from continuing with its disciplinary action and consequently reinstating him to his position of duty but has failed to disclose all pertinent facts to the court. That he seeks to curtail the powers of the 1st Respondent.

11. It is the 1st Respondent's case that on 14th October 2015, the Petitioner took over the responsibilities of managing the stores as the 1st Respondent's officer from one Mr. James Sikuku upon which a handing over report was prepared and signed by the two parties and a witness; that on 22nd October, 2015 Mr. James Sikuku further handed over a cabinet containing several items to the Petitioner and both the Petitioner and Mr. Sikuku signed an inventory; that subsequently a report was filed as to missing items from the store manned by the Petitioner; that on 30th October, 2015 the Petitioner confirmed the loss of items in the store and sought further investigation on the same. An investigative committee met and made a report which was forwarded to the Director of Public Prosecutions on 23rd December 2015.
12. It is averred that on 8th January 2016, the Petitioner wrote to the Secretary of Public Prosecutions seeking a reconsideration of the decision to surcharge him for the lost items.
13. That on 6th June 2016, vide a memo to the Secretary Public Prosecution, the Petitioner reported a second loss of items in the stores whereupon, on 10th June 2016, a decision to interdict him was communicated to him by the Secretary Public Prosecutions pending the determination of the matter. It was stated that the Petitioner was informed in that letter that loss of Government property was a serious offence that could lead to his dismissal as per the Human Resource Manual and that he was advised to respond thereto within 14 days.
14. The 1st Respondent contends that the matter was reported to Capitol Hill Police Station for further investigations.
15. That on 4th January 2017, a decision to surcharge the Petitioner was communicated to him.
16. It is the 1st Respondents position that the contention of the Petitioner that the decision to surcharge him was taken without informing him of the reasons is fictitious.
17. It is averred that on 30th June 2016 and 29th August 2016, the Human Resource Advisory Committee held a meeting to discuss the first loss of items by the Petitioner and his appeal against the decision to surcharge him was considered. The meeting resolved inter alia that further investigation be conducted and presented to the Committee; that on 21st March 2018 the Human Resource Advisory Committee held a further meeting to deliberate on the loss of items and further recommended that further investigation be conducted by the Director CID.
18. That subsequently on 22nd March 2018, the 1st Respondent wrote to the Director CID directing that further investigations be conducted; that on 25th June 2018, the Secretary Public Prosecutions wrote to the Petitioner informing him that investigations into the second loss of items in the store was ongoing and that the outcome would be communicated to him once concluded;
19. That on 22nd October 2018 the High Level Management meeting resolved that the stolen laptops be tracked and further investigations conducted including doing a fingerprint report. That on 6th February 2018, the Petitioner wrote to the Public Service Commission seeking its intervention as to his interdiction. The Public Service Commission wrote to the 1st Respondent seeking a response on the complaint raised by the Petitioner; that on 22nd March 2018, the 1st Respondent wrote to the Public Service Commission explaining that the matter was under active investigation and had been discussed in several meetings by the Human Resource Advisory Committee; that the Public Service Commission wrote to the Petitioner on 7th May 2018 advising him to await the decision of the 1st Respondent.



20. The 1st Respondent states that on 18th February 2019, the Secretary Public Service Prosecutions wrote to the Petitioner informing him of the decision to surcharge him for the loss of the items amounting to Kshs. 455,300; and that on 23rd July 2019, the Petitioner was informed by the 1st Respondent that the matter was still under investigations.
21. It is further averred that on 19th April 2018, vide a circular to staff, the Secretary Public Prosecution directed that payment of commuter allowance was to cease till further notice which decision was communicated to the Petitioner through his email address. This according to the 1st Respondent was informed by the auditor's report which was to the effect that an employee on interdiction ought not to be paid commuter allowance.
22. It is the 1st Respondent's contention that it has not reached any definitive finding in the investigations being conducted to warrant the filing of the petition by the Petitioner or his contention that there has been a violation of his rights.
23. The 1st Respondents maintained that the Petitioner has been consistently updated on the progress of his case. That he has failed to demonstrate in what way he has been harassed or subjected to physical or psychological torture.
24. The 1st Respondent prays that the amended petition be dismissed with costs to the 1st Respondent.

The 2nd Respondent's case

25. The 2nd Respondent filed grounds of opposition dated 24th July 2019 on its behalf and on behalf of the 1st Respondent in which it contends that the Petitioner has not demonstrated how the Respondents have violated or are threatening to violate his constitutional rights under the Constitution as was held in the case of *Mumo Mutemo v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR; that the Petitioner has not cited any provisions of the Constitution that have been violated by the Respondent; that the Petitioner's interpretation of the Constitution is misleading, misconceived and self-serving as he has the opportunity to raise any constitutional issues in a normal claim as was held in *Francis Atonye Ayeka v Kenya Police Service & Another* (2017)eKLR; that the petition is hapless, presumptive and an abuse of the court process and should be dismissed with costs.
26. The 2nd Respondent further avers that the grounds set out in support of the Petition do not raise any constitutional issue either for enforcement of fundamental rights or interpretation of the Constitution but raises issues that have been given effect under the *Employment Act* and the *Fair Administrative Actions Act* and should be dealt with in a normal claim.
27. On 11th May 2022, this court ordered that this Petition be disposed of by way of written submissions. The Petitioner filed his submissions dated 24th June 2022, the supplementary submissions dated 16th September 2022 and further submissions dated 25th November 2022. The 2nd Respondent filed submissions dated ... There are no submissions filed by the 1st Respondent on the court record.

The Petitioner's submissions

28. The Petitioner submitted that he was interdicted on 10th June 2016 and that he has been on interdiction to date without explanation. According to the Petitioner, the investigations and interdiction cannot hang over his head indefinitely. That they amount to mental torture and anguish.
29. It was his submission that before he was suspended, he was a permanent employee earning and entitled to a salary plus house allowance, commuter allowance and medical benefits as per his payslip and that



on interdiction, those benefits were withdrawn. He submits that the withholding of these benefits and half his salary violate his fundamental rights.

30. The Petitioner urged the court to reinstate him unconditionally, order for the release of all his withheld benefits by the Respondents and reinstate him to the position and salary where he would have been in 2022 had he not been interdicted on 10th June 2016.
31. In his supplementary submissions, the Petitioner submitted that his interdiction is against the 1st Respondent 's Human Resource Manual Section 11:17:5:5

2nd Respondents' submissions

32. The 2nd Respondent submitted that it has been enjoined to these proceedings in error as there is no employer-employee relationship between it and the Petitioner, that there are no prayers against it in the petition, that according to the Petitioner the 1st Respondent is his employer. It is further submitted that the 1st Respondent is an independent office by dint of articles 157(10), 252(1)(c) and 253(b) of the Constitution as well as section 6(b) of the Office of the Director of Public Prosecutions Act No. 2 of 2013. It prayed that the case against it be struck out.

Determination

33. I have considered the Amended Petition, the responses thereto and the submissions on record. The issues that fall for my determination are;
 - a. Whether the suit against the 2nd Respondent should be struck out for misjoinder;
 - b. Whether the Petitioner's constitutional rights have been infringed by the Respondents;
 - c. Whether the Petitioner is entitled to the orders sought in the petition.
34. The Attorney General is named as the 2nd Respondent in the Petition. As correctly submitted for the 2nd Respondent, there is no employer-employee relationship between the Petitioner and the 2nd Respondent. It is also a fact that by dint of articles 157(10), 252(1)(c) and 253(b) of the Constitution and section 6(b) of the Office of the Director of Public Prosecutions Act No. 2 of 2013 the 1st Respondent is an independent Commission with powers to sue and be sued in its own name. recruit its own staff. The Office of the Attorney General no longer has the responsibility to defend the 1st Respondent in suits filed against it.
35. I therefore agree with the 2nd Respondent that it has been wrongly joined in these proceedings. The Petitioner did not raise any issue over the averments by the 2nd Respondent that it has been wrongly joined. A scrutiny of the petition as amended confirms that there are no orders sought directly against the 2nd Respondent nor has it been named as a wrongdoer in the petition.
36. I accordingly strike out the 2nd Respondent's name from these proceedings.
37. The 1st Respondent has in its response averred that the instant Petition does not meet the threshold for petitions as was held in the case of Mumo Mutemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR. as the Petitioner has not demonstrated how his rights have been violated. That he has not cited any provisions of the Constitution that have been violated. It is the Respondents case that rights are very specific and a Petitioner who comes before the court must set out with some level of particularity the specific right and how they have been violated as held in the case of Anarita Karimi Njeru v Republic (1979) eKLR.



38. The Petitioner on the other hand maintains that the Respondents have violated his fundamental rights as he has been unlawfully surcharged yet the 1st Respondent has according to the averments in the Replying affidavit of Monica Mburugu, not finalized investigations. The Petitioner is further aggrieved by the delay in the investigations by the 1st Respondent and that his benefits such as house allowance, commuter allowance and medical cover have been withdrawn.
39. Rule 7 of the *Employment and Labour Relations Court [Procedure] Rules*, 2016 provides that:
- 7(1) A party who wishes to institute a petition shall do so in accordance with the *Constitution* of Kenya [Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution] Practice and Procedure Rules, 2012.
40. The Petitioner has in the Amended Petition anchored his claim on Articles 2, 10, 22, 23 and 47 of the *Constitution*. Article 22 (1) provides;
- “Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”
41. Article 47(1) of the *Constitution* provides:
- Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
42. The petitioner was interdicted on 10th June 2016. By the time the Petitioner came to court he had been on interdiction for more than 2 years. This is evidently unreasonable especially because the ODPP Human Resource Manual Sec 11, sub section 11.17.5.5 provides:
- Interdiction shall not exceed three (three) months, within which time investigations should be completed and disciplinary action determined.
43. Section K.3(4) of the Public Service Commission Human Resource Policies and Procedures Manual for Public Service also provides that:
- K.3 (4) disciplinary cases should be dealt with promptly and finalized within a period of six (6) months. Where it is found impracticable to do so the Authorized Officer shall report individual cases to the Public Service Commission explaining the reason for delay.
44. The Petitioner approached this court in July 2019, more than 2 years after his interdiction. No report had been made to the Public Service Commission by the 1st Respondent as requires under Section K.3(4) of the Manual. Indeed, it is the Petitioner who filed a complaint to the Public Service Commission about his inordinate interdiction.
45. The petitioner has further pleaded that the actions of the 1st Respondent infringe on his rights to fair labour practices. He further cited violation of his rights under Articles 29 and 43 of the Constitution. The two articles guarantee the freedom and security of the person and economic and social rights.
46. Fair labour practices is provided for in Article 41 of the Constitution. It is however not defined in either the Constitution or any legislation. Different courts have assigned different meanings to the term but in general, it has been used where the treatment of the employee unfair.



47. In this case it is evident that the Petitioner has been on interdiction for an inordinately long period. The same is in violation of the Human Resources Manuals for both the 1st Respondent and the Public Service Commission.
48. The instant petition was filed on 12th June 2019 after the Petitioners follow up letters to the Secretary, Director of Public Prosecution dated 17th June and 4th October 2016, complaint letter to the Director of Public Prosecutions dated 1st November 2017 and appeal to PSC did not yield any positive response.
49. It is therefore evident that the prolonged interdiction has violated the Petitioner's constitutional rights as he has been on half salary since then.
50. The ODPP Human Resource Manual Sec 11, sub section 11.17.5.5 provides for interdiction for a maximum of 3 months. The Petitioner's interdiction should therefore not have extended beyond 6th September 2016. The 1st Respondent has not tendered any valid reason to justify the prolonged interdiction. Indeed evidence adduced by the 1st Respondent points to extreme laxity and indifference in handling of the investigations in the Petitioner's disciplinary case.
51. By a letter dated 21st August 2017 the OCS Capital Hill Police Station wrote to the DPPs Office forwarding the Petitioner's inquiry file together with the findings and recommendations. The OCS informed the ODPP that he was waiting for further directions on the case.
52. Interdiction in this case was administrative, to remove the Petitioner from the workplace while investigations were carried out. This is different from punitive interdiction which is meted out as a punishment after an employee has been taken through a disciplinary hearing. Administrative interdiction which is accompanied by loss of remuneration like in this case becomes a punishment if it is prolonged. This is because stopping or interfering with a person's source of income can have many consequences which may not be capable of compensation with damages.
53. The interdiction has in effect turned out to be a punishment that the petitioner has suffered for 5 years. As put by the Petitioner, it is tantamount to an illegal sentence served outside jail.
54. The petitioner's case is compounded by the fact that while on interdiction he is required to be in his duty station and to report to the office once every month.
55. The prolonged interdiction has thus subjected the petitioner to psychological torture, economic embarrassment and denial of income without being found guilty of any offence. His right to dignity has been violated as has his right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as guaranteed by the constitution. He has further been subjected to unfair labour practice.
56. It is therefore my finding that the 1st Respondent has violated the Petitioners constitutional rights under articles 28, 29(d) 41,47 and 48 of the Constitution.

Is Petitioner entitled to the prayers he is seeking?

In the end, I make the following orders.

The petitioner's interdiction is terminated and

- a. The 1st Respondent is restrained from conducting or continuing with the disciplinary action against the Petitioner with respect to the matters that led to the interdiction that is the subject of this suit;



- b. The 1st Respondent is directed to reinstate the Petitioner to work without any loss of any benefits or status;
- c. The 1st Respondent is directed to pay the Petitioner all the half salary withheld from 10th June 2016 to date;
- d. The 1st Respondent directed to pay all the Petitioner's allowances including commuter allowance withheld from the 10th June 2016 to date.
- e. The 1st Respondent shall pay the petitioner's costs of this Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 21ST DAY OF JUNE, 2023.

MAUREEN ONYANGO

JUDGE

