



Waweru v Public Procurement Regulatory Authority; Institute of Certified Public Accountants & another (Interested Parties) (Constitutional Petition E075 of 2023) [2023] KEELRC 1763 (KLR) (24 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1763 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CONSTITUTIONAL PETITION E075 OF 2023**

B ONGAYA, J

JULY 24, 2023

**IN THE MATTER OF: ARTICLES 3,10, 19, 20, 21, 22, 23, 25, 27, 28, 41, 47, 50, 159, 162(2), 165(5)(B), 232, 236, 258 & 260 OF THE CONSTITUTION OF KENYA
IN THE MATTER OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT
IN THE MATTER OF THE EMPLOYMENT ACT, 2007
IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

BETWEEN

PATRICK MICHAEL NDUNGU WAWERU PETITIONER

AND

PUBLIC PROCUREMENT REGULATORY AUTHORITY RESPONDENT

AND

INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS .. INTERESTED PARTY

INSTITUTE OF INTERNAL AUDITORS-KENYA INTERESTED PARTY

JUDGMENT

1. The petitioner filed the petition dated April 20, 2023 through M/S Gwaro & Co Advocates. The petitioner prayed for:
 - a) A finding and declaration that the respondent's unilateral actions of transferring the petitioner from the position of senior internal auditor in its officers in Nairobi to the position of senior compliance officer to its western region offices vide a letter dated the 16th March 2023 infringed on the petitioners right to fair administrative action and therefore unlawful.



- b) A finding and declaration that the respondent's action to transfer the petitioner vide its letter dated the 16th march 2023 did not meet the constitutional, labour law and practices and standards and therefore declared null and void.
 - c) A conservatory order be and herby issued restraining the respondent from transferring the petitioner to any of its stations where he will be under the supervision and command under the control and management of Mr. James Kihara.
 - d) General damages for violation of the petitioner's rights
 - e) Any other relief that the honourable court deems appropriate, just and fit to grant.
 - f) Costs of the petition.
2. The petition was based upon the petitioner's supporting affidavit and exhibits thereto filed together with the petition and a further supporting affidavit sworn on June 7, 2023. The petitioner's case is as follows:
- a) He was employed by the respondent in the year 2016. Subsequently, on August 30, 2022, the petitioner was appointed by the respondent as a senior internal auditor.
 - b) In the year 2020, the board audit, risk and governance committee analysed several queries that had been raised by the petitioner and his colleagues at the internal audit department and made recommendations to the management organ, which were deliberated by the full board in its 10th full board meeting held on August 28, 2020. Among the recommendations that were made was to surcharge some of the affected staff members. Among those that were surcharged by the board was Mr. James Kihara who was the head of human resource and administration department, currently the regional office coordinator including the Western Kenya regional offices.
 - c) The respondent issued the petitioner a letter of transfer on March 16, 2023. The letter stated that he would be reporting to the regional offices coordinator through the principal officer and head of Kisumu regional office (who at material time the petitioner says is one Mr. James Kihara). The letter further stated that the management decision was that the petitioner being a Senior Internal Auditor was being transferred from the Internal Audit Directorate at the Head Office to the Western Regional Office at Kisumu to the position of Senior Compliance Officer. The letter directed him to report to the new station by April 11, 2023.
 - d) The petitioner filed an appeal against the transfer by his letter dated March 20, 2023. He states that the appeal was as per the provisions of section 12.2.5 of the Public Procurement Regulatory Authority Human Resource Policy and Procedures Manual of May 2022. The section provides grievances be forwarded to the Director General who considers the nature of the grievance and shall in his discretion deal with the matter directly or channel to the Human Resource Management to conduct further investigations on the complaint and submit a report within a specified period. By letter dated April 6, 2023, the Director General notified the petitioner that his appeal had been declined since the Human Resource Management Advisory Committee (HRMAC) at its meeting of April 4, 2023 had found no sufficient grounds of appeal were present to rescind the transfer decision. He was required to report to the new station by April 24, 2023. The petitioner states that the decision to dismiss the appeal was arrived at without giving him an opportunity to appear before the management and to be heard.



- e) The petitioner being aggrieved by the decision of the management of the respondent to dismiss his appeal, he lodged another appeal to the board of the respondent on 06.04.2023. As at the time of the petitioner filing his petition, it is the petitioner's case that the board had neither acknowledged receipt of the appeal nor sat to hear and determine the appeal by the petitioner. In that his 2nd appeal addressed to the Chair-Audit, Risk and Governance Committee and to Chair- Finance and Administration Committee the petitioner stated as follows:
- i He was required by that transfer to report to Kisumu under the direct supervision of Mr. James Kihara who had previously served as in charge of the respondent's HR & A department and the Auditors including the petitioner had raised many audit queries taking the said James Kihara to a disciplinary process in September, 2021. The said James Kihara is on record complaining against the petitioner and alleging the petitioner was behind his woes and those allegations had never been substantiated. Further there was a pending investigation by the DCI starting September 2020 involving the said James Kihara involving misuse of the respondent's motor vehicle when he headed the HR & A department. The petitioner apprehends mistreatment under the direct supervision of the said James Kihara.
 - ii The transfer is discriminatory amounting to constructive dismissal and violation of Article 236 of the Constitution of Kenya, 2010 on protection of public officers. The Article provides that a public officer shall not be victimised or discriminated against for having performed the functions of office in accordance with the Constitution or any other law, or, dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.
 - iii The transfer amounts to re-designation of the petitioner from Senior Internal Auditor in the Internal Audit Directorate to Senior Compliance Officer in the Western Region. The petitioner invokes the definitions of transfer and re-designation under the Public Service Commission Act, 2017 that transfer is a horizontal movement of an employee wherein there is a change in the job without any changes or revision in remuneration, pay and modification of responsibilities and, re-designation means the movement of a public officer from one career path or cadre to another at a grade equal to or substantially equal to the one held before the movement. The petitioner stated that under section 40 of the Act, the criteria for appointments under the Act applies to selecting public officers for re-designation; a public officer who wishes to re-designate shall apply, in writing, to the respective authorised officer or to the Commission through the concerned authorized officer, as the case may be, for re-designation; and, an officer may be re-designated to hold or act in a public office if the office is vacant, the officer meets all the equalisations, the re-designation shall not disadvantage any public officer who is already serving in the particular cadre, the officer has consented to such re-designation decision, and, the decision shall not reduce the public officer's salary. The petitioner stated that the provisions of section 40 of the Act had been domesticated in paragraph 2.31.1 and 2.31.2 of the respondent's Human Resource Policy and Procedures Manual, 2022 thus, respectively: The Authority may, from time to time review and recognize the staff establishment of the institution. This may necessitate the re-designation of titles and job specifications. Re-designation of an employee may require redeployment. Further: In selecting employees for re-designation, the criteria for appointment shall apply. If an employee is re-designated, the employee shall not in any way suffer reduction in remuneration. The petitioner stated that his transfer



did not meet the set criteria for re-designation or meet criteria for appointment to the position of Senior Compliance Officer.

- iv. The petitioner and the audit team had raised an audit query about failure to implement Salaries and Remuneration Commission approved interest rates of 3% plus a further 1% for administrative costs. The 1% had not been implemented and the query rattled some members of the management. The petitioner had made sure that the Auditor General received respondent's accurate and complete statements relating to financial year 2021/ 2022. That appeared to be a 'sin' again unsettling some of the respondent's management and which 'sin' continued to haunt the petitioner. He complained of discrimination as follows. The management denied him an opportunity to attend Board Audit Committee (BAC) master class training held between 12th and 16th September 2022. He complained about a conspiracy to deploy him to Compliance Directorate in July 2022. He complained to the Director General how James Kihara made him move away from the office he was operating from and reported about a scheme to make Internal Audit Directorate dysfunctional. At a meeting convened by the Director General on October 3, 2022 the petitioner was intimidated and harassed by being accused of directly dealing with BAC but specific details of the dealings were not disclosed. The meeting challenged the petitioner's recommendation that his superiors including the Director General be surcharged as that amounted to disrespect and the Director General committed to rescind all previous Board decisions on such surcharge. The petitioner was directed not to attend BAC meetings and if he did he must remain silent as only head of Audit could address BAC. He was accused of going to leave without permission or approval but which he denied. In 2022 he had raised an audit query about breach of policy to pay extraneous duty allowance only to restricted staff members. He raised a query about purchase of a mobile phone for Kshs.145, 000.00 while the circular limited such cost to Kshs. 30, 000.00. Another audit query in May 2022 had been about payment of a police officer deployed for Director General's close protection a top-up allowance beyond the prescribed figures. In October 2022.
 - f) On March 17, 2023 the petitioner requested for the detailed management decision that led to his re-designation in order to enable him to lodge his appeal, but, that information was not given to him. Subsequently, on April 28, 2023 the petitioner further requested for a copy of his personal file, information that was never given him.
 - g) The petitioner states that there have been previous attempts by the respondent to transfer him from his position as an internal auditor to a completely different position. The first attempt was done in July 2022, which was a deployment to the compliance directorate, the second one was done in October, 2022, which was a deployment to strategy & planning directorate.
 - h) It is the petitioner's case that the position of senior compliance officer does not offer the petitioner an opportunity to have career progression as a trained internal auditor of immense experience and that the decision of the respondent is meant to demoralize the applicant and ultimately push him out of employment.
 - i) The petitioner has in his petition raised cases where he alleges having faced open discrimination from the management of the respondent, and states that the discrimination and biases he has faced from the management of the respondent have been as a result of him performing his duties as required by the [*Public Finance Management \(National Government\) Regulations, 2015.*](#)



3. The 2nd respondent did not enter appearance and did not participate in the proceedings. The 1st respondent filed a replying affidavit dated May 22, 2023 sworn by Gitonga Mwangi, the Acting Deputy Director Human Resource and Administration and filed through the Hon. Attorney General. Learned Senior State Counsel Christopher Mulili appeared in that behalf. It was stated and urged as follows:
- a) That in September, 2022, the respondent undertook a reorganization of its human resource structure. The reorganization led to deployment of staff to new directorates created under the new structure.
 - b) That an assessment of the implementation of the new organization structure was done in February, 2023 and reports submitted for deliberation in the same month to the Director General by the directors of all directorates, the regional office coordinator and the review board secretary.
 - c) That following submission of the reports and the deliberations thereof, the management agreed that the Director General should initiate a discussion with the Ag. Director of Internal Audit on how to reorganize the directorate of internal audit so as to support the core mandate of the authority and aid in addressing the staff shortages faced by the respondent.
 - d) That it was agreed that given that the petitioner was familiar with compliance monitoring work and held the requisite qualifications for the job, he could be deployed to support the technical departments in compliance monitoring.
 - e) That the discussions to transfer the petitioner were undertaken in line with clause 2.35.3 of the respondent's *Human Resource Policy and Procedures Manual* May, 2022.
 - f) The acting director, internal audit agreed to have the petitioner transferred and have the directorate operate with one employee.
 - g) The acting deputy director hr & administration presented the matter of the petitioner's transfer to the human resource management advisory committee and the matter was deliberated during the committees meeting held on 13.02.2023.
 - h) That the committee deliberated on the matter and resolved to recommend to the director general that the petitioner be deployed from internal audit to compliance to work as a senior compliance officer, grade PPRA 5 in line with the need to build capacity of this critical function following the change in compliance monitoring approach and the implementation of the new structure.
 - i) That the petitioner was issued with a letter of transfer on March 16, 2023 on March 20, 2023, he appealed against the transfer and his appeal was considered by the HRMAC on 05.04.2023, the HRMAC found no satisfactory reasons for rescinding the transfer and rejected the appeal with a recommendation that the petitioner reports to his new work station by 24.04.2023. This decision was communicated to the petitioner on 06.04.2023 who on the same day, wrote to the Director General stating that he would be appealing against the decision of the HRMAC, the petitioner however did not lodge any appeal as required under Clause 12.2 of the respondents' *Human resources policies & procedures manual* on grievance procedure.
 - j) It is the respondent's case that the instant petition and application are premature as the petitioner has not exhausted the appellate procedure laid down in the respondent's human resource policies.



4. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
5. To answer the 1st issue, the Court returns that it is ingenious and misconceived for the 1st respondent to urge that the petition was premature for want of exhaustion of internal appeal process and at the same time urge that the appeal as presented by the petitioner was belated. It is that by the 1st respondent's own line of argument, the appeal was belated and the internal appeal process was thereby spent or the initial appeal having been determined, the appeal process was exhausted. The Court returns that the petition was not premature at all.
6. To answer the 2nd issue, it is indeed established that the transfer was a re-designation per section 40 of the [Public Service Commission Act](#), 2017. The same was incorporated in the respondent's internal Manual as cited for the petitioner. The petitioner has established that he never initiated the transfer that amounted to re-designation. He has shown that he has invested in training and self-development as an expert internal auditor. The re-designation as per transfer decision is found averse to the petitioner's career development. It must therefore be declined as unfair and unreasonable. In a resignation the [Act](#) provides that the public officer initiates the same. That was not the case. It was unreasonable decision. It was an unfair labour practice in contravention of Articles 41 and 47 of the [Constitution](#).
7. To answer the 3rd issue, the Court finds that the petitioner has established well founded complaints or grievances that appear to have blended the transfer decision. The unresolved but genuine grievances appear to have informed the transfer decision and such was unfair per section 46 of the [Employment Act](#), 2007 as the genuine grievances could not constitute a valid basis to impose the impugned transfer. The Court finds that it was illegal and unfair. Indeed, the petitioner has established that for having performed his duties as an internal auditor, he was victimised and harassed at meetings and later it culminated in the impugned transfer. The Court finds that the transfer amounted to contravention of Article 236 of the [Constitution](#) as urged for the petitioner.
8. To answer the 4th issue the Court returns that the petitioner has established that he is entitled to the remedies as prayed for except the prayer for compensation for the established violations because in the instant case, the petitioner continued to work with full pay. The violations would therefore not render themselves to a justification for an award of general damages.
9. The petitioner has succeeded in his claims and prayers and is awarded costs of the petition.

In conclusion, judgment is hereby entered for the petitioner against the 1st respondent for:

- a) The finding and declaration that the respondent's unilateral actions of transferring the petitioner from the position of senior internal auditor in its offices in Nairobi to the position of senior compliance officer to its western region offices vide a letter dated the 16th March 2023 infringed on the petitioner's right to fair administrative action and therefore unlawful.
- b) The finding and declaration that the respondent's action to transfer the petitioner vide its letter dated the 16th march 2023 did not meet the constitutional, labour law and practices and standards and therefore is hereby declared null and void.
- c) The conservatory order hereby issued restraining the respondent from transferring the petitioner to any of its stations where he will be under the supervision and command under the control and management of Mr. James Kihara unless his grievances in that regard are resolved.
- d) The 1st respondent to pay the petitioner's costs of the proceedings.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
MONDAY 24TH JULY, 2023.**

BYRAM ONGAYA

PRINCIPAL JUDGE

