



Njeri v Kenya Institute of Mass Communication & another (Judicial Review E28 of 2022) [2023] KEELRC 1714 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1714 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW E28 OF 2022**

MN NDUMA, J

JULY 13, 2023

**IN THE MATTER OF ARTICLES 10, 35, 47, 50, 159 (2)
(D) AND 236 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTION 3 AND 12 OF THE
EMPLOYMENT AND LABOUR RELATIONS COURTS ACT**

AND

**IN THE MATTER OF SECTIONS 3, 4, 6, 7, 8, 9, 10, 11 AND 12 OF
THE**

FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

**IN THE MATTER OF SECTIONS 4(1) (B) AND
(3) OF THE ACCESS TO INFORMATION ACT**

AND

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE
LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA**

AND IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

BETWEEN

FAITH NJERI APPLICANT

AND

KENYA INSTITUTE OF MASS COMMUNICATION 1ST RESPONDENT

**DIRECTOR/SECRETARY TO THE COUNCIL KENYA INSTITUTE OF MASS
COMMUNICATION 2ND RESPONDENT**



JUDGMENT

1. The substantive Notice of Motion application dated 25th October, 2022 was filed pursuant to leave granted by the Court on 24th October, 2022. The leave granted was to act as stay.
2. The applicant prays for orders:-
 1. Mandamus Compelling the Respondents to reinstatement and release with immediate effect the Applicant's half salary withheld from the date of interdiction.
 2. Prohibition Restraining the Respondents by themselves, their agents or authorised representatives from subjecting the Applicant to further unfair disciplinary action or attempting to dismiss, remove from office, demote in rank or even victimize the Applicant in any way.
 3. Mandamus Directing the Respondents to give written reasons for the disciplinary action and punishment they imposed against the Applicant and to furnish the Applicant with the Investigation Report, relevant documents and material evidence relating to the matter.
 4. Declaration that the process of punishing and disciplining the Applicant and the interdiction was fatally flawed, unlawful and procedurally unfair for violating the Constitution, the Fair Administrative Action Act, and therefore a nullity.
 5. Declaration that the procedure followed to punish and interdict the Applicant violated her right to a fair hearing, access to information, right to fair administrative action as well as principles of natural justice as guaranteed under the Constitution and the Fair Administrative Action Act.
 6. Declaration that the further punishment imposed on the Applicant after lifting the interdiction was illegal, unfair unprocedural and was not based upon logical proof or evidential material.
 7. Declaration that the amounts of Applicant's salary unlawfully withheld amounted to arbitral denial of access to her income and the same be refunded to the Applicant with interest.
 8. The costs of this Application be provided for.
3. The application is supported by the annexed statutory statement and the accompanying verifying affidavit wherein is set out the premise of the application to wit that the applicant is a Principal Lecturer in Production Department and a full time Student Counsellor, of the respondent Kenya Institute of Mass and Communication (KIMC).
4. That on 14th February, 2022 the applicant informed the Head of Department of her inability to report on duty on that day due to illness.
5. That the applicant was truly indisposed and was well indulged by the Head of Department who instructed her to at least organise the students to be busy and arrange for make-up classes.
6. That to the applicant's surprise, the respondents via a letter dated 11th March, 2022 asked the applicant to show cause why disciplinary action should not be taken against her for missing classes, which letter was forwarded on 14th March, 2022.



7. The applicant promptly responded to the show cause letter by a letter dated 21st March, 2022 outlining the reasons for her inability to attend the sessions in question and that her absence was duly authorised by the Head of Department who understood her situation and was kind enough to indulge her during the 1st session. Regarding the 2nd session, the applicant explained that she was actually present but was engrossed with difficult counselling sessions (one suicidal) and engaged the class with assignments.
8. The applicant also explained that it was pretty hard to juggle between being a full time Student Counsellor as indicated and at the same time conducting teaching students during additional hours that were added to her workload vide a letter dated 16th February 2021.
9. The respondent by a letter dated 25th March, 2022, further requested the applicant to furnish further evidence in support of her allegation some of which were to be presented in confidence.
10. That since some of the information required was confidential, the applicant made attempt to seek the respondent's audience on 30th March, 2022 to which the Director responded the same day and informed her that he was still out on leave.
11. That the letter of 25th March, 2022 did not guide the applicant on how to present the confidential information or the period within which to respond as per the requirements of the Disciplinary Manual for the Public Service hence her seeking guidance on 30th March, 2022.
12. On 20th April, 2022, the applicant was summoned before a Management Board by a letter dated 19th April, 2022 to appear on 25th April 2022 to explain why she failed to respond to a lawful letter addressed to her.
13. That the applicant acknowledged the said letter and did a response on 21st April, 2022, explaining the circumstances that led to the mix-up and forwarded her letter dated 29th March, 2022 in response to the said respondent's letter dated 25th March, 2022.
14. That the applicant was surprised to be interdicted with immediate effect by a letter dated 25th April, 2022 upon appearing before the Management Board. The Applicant was placed on half salary during the period of interdiction.
15. That the discipline imposed on the applicant was unjustified in the circumstances of the case and the respondent did not follow the principles guiding the exercise of disciplinary control.
16. The applicant had made a clear and full explanation of the circumstances that led to her missing one session and attending to counselling sessions during the other teaching session.
17. That the action violated the prescribed Human Resource Disciplinary Control Code and Manuals of the Public Service Commission of Kenya, which restrict all disciplinary cases to be processed through the respective Human Resource Advisory Committee.
18. Paragraph (4.0) (a) of the current Disciplinary Manual for the Public Service (2016) also provides that:-

“Disciplinary cases dealt with under delegated powers shall be processed through the respective Human Resource Management Advisory Committee.”
19. That the Management Board team that the applicant appeared before on 25th April, 2022 investigated the matter and the applicant appeared before the same team on 21st July, 2022 for the hearing of her case.



20. That the said interdiction was illegal and the respondent acted ultra vires since interdiction is only applicable in cases related to a Criminal charge or if a case is one of gross misconduct which is likely to lead to dismissal.
21. That the allegations made against the applicant did not meet the said threshold to warrant interdiction. The absence on both occasions was justified.
22. The interdiction was said to be as a result of:-
 - a. failure to provide evidence of sick-off for the period in question evidence of alleged make up class and record or evidence of the counselling session;
 - b. Habitual absenteeism as per the records in her file since 2001 to date,
23. That the respondent shifted the burden of proof on the applicant who had reasonably explained herself regarding the two alleged missed sessions.
24. That the respondent failed to give the applicant sufficient notice to prepare her defence contrary to Section 4(3) (a) of the Fair Administrative Action Act. The letter dated 18th July, 2022 was communicated to the applicant on the afternoon of 20th July, 2022 requiring her to appear before the Committee on 21st July, 2022 at 10.00 am giving her barely few hours to prepare her defence and attend a hearing of non-existent charges.
25. The applicant was not furnished with the charges; evidence relied upon and was not given opportunity to confront and/or cross-examine her accusers hence the respondent flouted Section 4(3) (g) (f) and 4(4) of the Fair Administrative Action Act as read with Article 47 of the Constitution.
26. The interdiction was not based on any described or known charges contrary to Article 50(2) (b) of the Constitution.
27. The applicant was never presented with any investigation report or any evidence that the respondent intended to rely on contrary to Section 4 (3) of the Fair Administrative Action Act.
28. The respondent did not display fidelity to the prescribed procedures and proceeded to interdict the applicant with immediate effect on 25th April, 2022 which interdiction exceeded the recommended period of three (3) months.
29. On 2nd August, 2022 the applicant received a letter dated 27th July, 2022 lifting her interdiction which letter surprisingly gave the applicant a Final Warning in blatant contravention of Disciplinary Procedure which prescribes the stages to be passed before arriving at a final warning.
30. The said letter also imposed sanctions and punishment against the applicant despite the fact that she was compelled to face allegations without any investigation report or any compelling evidence.
31. The applicant exhausted internal mechanism in vain including filing a complaint with Public Service Commission over the unfair interdiction and with the office of Ombudsman. Her request for the investigation report and reasons for the disciplinary action were also ignored.
32. The applicant was unable to appeal to Public Service Commission due to non-availability of the investigation report hence the suit. That despite lifting of the interdiction, the withheld half salary was not refunded.
33. The applicant prays for the reliefs sought.



Replying Affidavit

34. The respondent filed replying affidavit of Hiram Mucheke who deposes inter alia that the disciplinary process of the respondent is governed by the Institute's Human Resource Manual and not the Public Service Commission Manual or the repealed Public Service Commission Regulations, 2005.
35. That the respondent commenced disciplinary process against the applicant for missing two teaching sessions by issuing her with a show cause letter.
36. That in her response, the applicant admitted that she had indeed missed the two teaching sessions. She admitted that she did not inform her head of department of her absence in the 2nd session but alleges that she had informed the head of department when she missed her 1st session due to illness on 11th March, 2022.
37. That the applicant's letter dated 21st March, 2022 is attached to the replying affidavit.
38. That upon considering the response, on 25th March, 2022, the respondent requested the applicant to furnish evidence or documents, including the sick sheet for the period she was unwell, evidence of the make-up class and evidence of the counselling sessions that made her miss the class. The applicant despite assurance that the information will be treated with confidence did not provide the requested evidence or respond to the institute's letter. She was consequently invited to appear before the management Board on 25th April, 2022 to explain the reason why she failed to respond to the institute's letter of 25th March, 2022. The claimant then responded to the institute's letter by her letter dated 21st April, 2022.
39. The applicant attended the Board meeting on 25th April, 2022 and was heard and the Board resolved to interdict the applicant for three (3) months for among others things failure to provide evidence of what led to her absenteeism on the period stated in the show cause letter. The letter of interdiction was in terms of Clause 12.11.1 of Human Resource Manual which allows the Director to interdict an employee to allow for investigations where proceedings may lead to dismissal.
40. That per Clause 12.6.1 of the Human Resource Manual absence from duty is classified as a gross misconduct which attracts summary dismissal in terms of Clause 12.15.1 of the manual.
41. That the interdiction was a preventive interdiction initiated in accordance with Clauses 12.11.1; 12.15.1 and 12.6.1 (i) of the Human Resource Manual to pave way for investigations.
42. That it was not necessary to conduct a hearing before the interdiction and the same was procedural therefore.
43. That a six (6) member investigation Committee was appointed to investigate among other things the applicant's absenteeism from class and the consistency in attending counselling sessions.
44. That various witnesses were called during the investigation including Head of Department, the Dean of Students and Students in the classes the applicant teaches.
45. The applicant was then invited to a meeting on 25th July, 2022 when she was accorded opportunity to know and understand the evidence collected during the investigation and was given a chance to rebut the same. The minutes are before Court. After the hearing, the investigation Committee finalised its investigation and on 26th July, 2022 prepared and submitted a report with recommendations to the Chief Executive Officer.



46. That it was established that the applicant missed classes on the two occasions as stated in the show cause letter and was unable to balance her teaching and counselling roles. As a result, the Committee recommended that:-
- i. The applicant be given a terminal warning that a repeat of similar misconduct may lead to commencement of proceedings for her dismissal from service.
 - ii. The applicant will be assigned four (4) hours for teaching and the rest of the hours to be dedicated to counselling sessions.
 - iii. The applicant will be clocking in the administration main gate for two (2) terms after which she will be appraised on her punctuality and reporting for duty.
 - iv. The applicant will administratively report to the Head of Production Training and functionally to the Dean of Students.
47. That the Sanctions were according to the Human Resource Manual and in particular Clause 12.6.1 (i) which calls for the employee to be issued with only one and final warning for serious offences. That other recommendations were not punitive in nature but were measures intended to assist the applicant upon resumption of duty to discharge her duties properly.
48. On 27th July, 2022, the respondent therefore lifted the interdiction allowing the applicant to resume duty. The interdiction did not exceed three (3) months since it commenced on 25th April, 2022.
49. The respondent did not violate the Human Resource Manual at all.
50. That the applicant was not therefore harassed, victimised and or discriminated upon as alleged or at all and the respondent did not violate Article 47 and 50 of *the Constitution* as alleged nor the provision of Fair Administrative Actions Act as alleged by the applicant or at all.
51. That the application be dismissed with costs.
52. The applicant joined issues with the respondent in the supplementary affidavit dated 16th December, 2022 and reiterated the particulars of the application as set out in the application and statement of facts and in particular that interdiction is only applicable in cases related to a criminal charge and cases of gross misconduct that may lead to dismissal. That she had fully explained her absence in one teaching session due to illness and another while attending to other mandated lawful duties and her conduct did not constitute gross misconduct for neither of the two constituted unlawful absence.
53. That in the absence of provision of the investigation report and a fair hearing before a separate panel than that which conducted the investigation including opportunity to confront her accusers, the disciplinary process was flawed and violated Article 47, 50 and provisions of Fair Administrative Actions Act, set out in the application.
54. The parties filed submissions and list of Authorities and the issues for determination are:-
- a. Whether the applicant has established infringement of her constitutional and statutory rights and the provisions of Institutes Human Resource Manual governing discipline of Public officers.
 - b. Whether the applicant is entitled to the reliefs sought.



Determination

55. The court in answering the above is well guided by the case of Anarita Karimi Njeru vs- Republic [1979] eKLR that a person who refers to a constitutional petition should set out with a reasonable degree of precision the nature of complaint(s) complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed. See also Civil Appeal no 290 of 2012 - Mumo Matemu -vs- Trusted Society of Human Rights Alliance (2013) eKLR.
56. In the present matter, the petitioner was accused of having missed two teaching sessions on two different days. She was served with a notice to show cause to which she responded with the explanation that during the first session she missed, she was ill and had obtained permission of the head of department to be away. The Court has not to-date seen any explanation by the said head of department refuting the explanation by the applicant. In respect of the second session missed, the applicant explained that she was at the time involved in a critical counselling sessions, one involving a suicidal case of a student, hence missed the class. The applicant went ahead to explain that she had taken steps to remedy the missed lessons. It is common cause that the applicant doubled up as a class teacher as well as a Counsellor. Clearly, it was within the mandate of the applicant to attend to serious counselling sessions as explained. To-date, the respondents have not tabled any evidence before Court that contradicts the explanation by the applicant.
57. The respondents wrote to the applicant requesting for evidence that she was indeed ill. The applicant did not allege that she had gone to hospital on the date she was excused by the head of department. Demanding medical evidence in the circumstances of this particular issue was misguided, unreasonable and oppressive. The issue is that the head of department had authorised the applicant to be absent on the day. The respondent did not adduce any evidence to the contrary. With regard to the second absence, all the parties are in agreement that counselling was part of the duties allocated to the applicant. It cannot be a misconduct on the part of the applicant to conduct critical counselling which was part of her duties and attend to the teaching lessons later as she had explained. The decision by the respondents to interdict the applicant to purportedly investigate matters that had been sufficiently explained sounds vindictive, oppressive and unreasonable. The respondent in fact manufactured a new charge as the reason for interdicting the applicant with half pay for a period of three months. The respondents explained that the interdiction was pre-emptive and was punishment for the failure by the applicant to respond to the letter by the respondent dated 25th March, 2022 requesting her to provide evidence of her illness and demonstrate that she had made up for the missed classes.
58. The respondents did not provide any evidence to rebut the explanation given by the applicant on the two issues, but instead made a new offence and shifted the burden of rebuttal to the applicant when this was clearly up to the respondents to disprove.
59. The manner in which the disciplinary process was conducted appears to a reasonable person to be biased, unreasonable and overboard. The applicant was then interrogated by a Committee of the Board tasked to investigate the matter. The committee despite requests did not provide the applicant with the report and or outcome of the investigation. The applicant was simply summoned to appear before the committee, on short notice and was informed of the outcome of the investigations and was asked to explain herself. The Committee then went ahead to recommend a final warning be served on the applicant and other administrative measures taken including clocking in daily. A new reporting order was also imposed on the applicant.
60. The Court is of the finding that the applicant was not given a fair hearing in violation of Article 50 of the Constitution of Kenya, 2010 by the Committee, which investigated the matter and also conducted the



disciplinary hearing. The Committee also violated the rules of natural justice by being the investigator and judge at the same time. The Committee cannot escape the badge of bias. The committee unfairly failed to provide the applicant with the investigation report before she appeared before them to enable her defend herself. The request by the applicant to get the report was not heeded even as she went to other forums to challenge the decision of the committee.

61. Cumulatively, the decision by the respondent did not meet the threshold of a fair and just administrative action. The respondents therefore violated Article 47 of *the Constitution* of Kenya read with Section 4 of the *Fair Administrative Action Act*, 2015.
62. The applicant also suffered double jeopardy in that she was punished vide the interdiction and deduction of half salary for failing to respond to the letter by the respondents timeously. Indeed, the applicant later on responded to the alleged letter and provided an explanation for the delay.
63. The Court finds that the decision by the respondents to interdict the applicant on half salary was not only unjust but was arbitrary, oppressive, and unreasonable and therefore unlawful, null and void. The applicant is entitled to the refund of the deducted half salary and a reversal of that interdiction which had no basis in *the Constitution*, statute or the Institute's Human Resource Policy since the applicant had not grossly misconducted herself. There was no evidence at all adduced by the respondents to support such a proposition.
64. Indeed, the Investigation Committee did not frame any such charges against the applicant before she appeared before them. The decision of the Committee to give the applicant a final warning and other sanctions was based on no framed charges at all and violated the principles of legality and fairness.
65. In the final analysis, the applicant has proved her case as set out in the application against the respondents on a balance of probabilities and the Court so finds and grants the applicant the reliefs sought.
66. The Court makes the following final orders:-
 - (a) Mandamus compelling the respondents to refund the half salary deducted and withheld by the respondents during the period of unlawful interdiction to the applicant immediately with interest at Court rates from the date of deduction until payment in full.
 - (b) Declaration that the process of punishing and disciplining the applicant and the decisions made thereat including interdiction; service of final warning and discriminatory reporting were fatally flawed, unlawful and procedurally unfair for violating *the Constitution*, the *Fair Administrative Action Act* and the Institute's Human Resource Manual.
 - (c) Mandamus directing the respondents to reverse all the sanctions imposed against the applicant including interdiction; service of terminal warning, clocking in at the administration main Gate for two (2) terms and newly imposed administrative reporting not in line with the applicant's terms and conditions of employment.
 - (d) Costs of the suit.
67. It is so ordered.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 13TH DAY OF JULY, 2023.

Mathews N. Nduma

Judge

Appearance



Mr. Ochola for the Applicant

Mr. Malonza for Respondent.

Ekale: Court Assistant.

