



REPUBLIC OF KENYA



KENYA LAW
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**Tuguro v National Intelligence Service & another (Petition E213 of 2022)
[2023] KEELRC 2614 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2614 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E213 OF 2022**

NJ ABUODHA, J

OCTOBER 27, 2023

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010
ARTICLES 10; 19(2); 20(1), (2), (3) & (4), 21(1); 27(4); 28;
31 (C) & (D); 41(1) & (2); 47; 50; 165(3); (B); 242(1), (2) &
(3).**

AND

**IN THE MATTER OF THE NATIONAL INTELLIGENCE SERVICE
ACT (NO. 28 OF 2012).**

AND

**IN THE MATTER OF UNLAWFUL AND UNFAIR DISMISSAL OF
A SENIOR INTELLIGENCE OFFICER 1 (NIS LEVEL 8) ON 1ST
SEPTEMBER, 2022**

BETWEEN

SAMSON GEKURA TUGURO PETITIONER

AND

THE NATIONAL INTELLIGENCE SERVICE 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. Through a petition dated 5th December, 2022, the petitioner herein alleged *inter alia* :

The Facts



- i. On or about the 3rd July 2016, the Petitioner was appointed Intelligence Officer I (NIS Level 6) by the 1st Respondent after successfully completing a senior Intelligence Officer Basic Course at the National Intelligence academy for Six (6) months and was then promoted to Senior Intelligence Officer II (NIS Level 7) on 3rd January 2017 and later promoted to the position of Senior Intelligence officer I (NIS Level 8) on 1st July, 2020.
- ii. In 2017, the Petitioner was posted to Wajir County as the Senior Intelligence Officer in charge of Eldas Sub-County and a member of the Eldas Sub-County Security and intelligence Committee where he worked until May, 2018 when he was transferred to Isiolo County as the County Analyst.
- iii. The Petitioner worked in Isiolo County until February, 2022 when he was then transferred to Turkana to work in the same capacity.
- iv. The Petitioner worked so diligently and committedly and never had any disciplinary case or warning and his integrity was exemplary accompanied by high performance in all the years to serve the 1st Respondent, however, on or about the 25th of April, 2022 he was served with a Show-cause letter for Gross Misconduct/Interdiction dated 25th April, 2022.
- v. The 1st Respondent invited the Petitioner to appear before the Board of Inquiry at the Director Internal Conference Room, NIS Headquarters on the 15th of June, 2022 at 11.00 am which the Petitioner attended.
- vi. The Petitioner was further invited to a second meeting with the Board of Inquiry at the NIS Headquarters on the 21st of June, 2022 at 11.00 am which the Petitioner attended.
- vii. Before and during the Inquiry, the Petitioner raised his concerns on the Conduct of the matter, by the 1st Respondent Board, however, his concerns were dismissed and he was. Instead warned by the Inquiry officers that he did not have any right to make demands but to respond to the questions being asked.
- viii. The Petitioner was further invited to a second meeting with the Board of Inquiry at the NIS Headquarters held on the 21st of June, 2022 which the 1st Respondent Board invited two witnesses, Eric Bii, Isiolo County Intelligence Coordinator and Ahmed Mohammed who worked with the Petitioner at the E-Citizen Vetting Process in Isiolo. The Petitioner attended to the meeting as required of him.
- ix. During the meeting Mr. Eric Bii who was the Supervisor at Isiolo County testified that there was no evidence of involvement in any of the stated allegations against the Petitioner, however, the 1st Respondent Board denied the Petitioner a chance to cross-examine Eric Bii and refused to show the Petitioner the contents of the confidential letters submitted by Eric Bii they were relying on.



- x. The 2nd witness Ahmed Mohammed testified that there were no complaints against the Petitioner or the Petitioner of their involvement in any malpractice during the vetting process.
- xi. The Board Chairman attempted to coerce the Petitioner to change his initial plea of not guilty to guilty and to write a mitigation plea for leniency seeking forgiveness since they had some incriminating evidence that would lead to his dismissal but the Petitioner rejected the approach.
- xii. On or about the 24th of July, 2022, the Turkana Intelligence Coordinator (CIC) notified the Petitioner that the Board, Inquiry" had found him guilty⁷ of all charges and he should await the final decision. However, asked him to urgently submit a mitigation plea to allow leniency final ruling.
- xiii. On or about the- 23rd of August, 2022, the Petitioner was unlawfully and unfairly dismissed from the National Intelligence Service with effect from 1st September, 2022 without any lawful cause and/or justification whatsoever.
- xiv. The 1st Respondent consistently posted the Petitioner to risky and hardship areas such, as Wajir, Isiolo and Turkana areas which were miles away from his home area of Kuria East-Migori County which violated. The provisions of Articles.27(4) and 41(1) and (2) of the *Constitution* of Kenya 2010.
- xv. Even after the Petitioner sought clarification from his Supervisor (Isiolo County Intelligence Coordinator) he "was advised to first report to his new station in Turkana County to allow his. supervisor to pursue the matter on his behalf however no action was taken. Which amounts to discrimination on the part of the Respondent.
- xvi. The 1st Respondent made Six (6) allegations against the petitioner; however, the 1st Respondent only tried him for Count one which was soliciting and receiving bribes from other officers or members of the public contrary to DRR 2.1. However, the 1st Respondent Board, denied the Petitioner a fair hearing and made unfounded and unproven allegations, against him which led to their decision of dismissing him from service in violation of Articles 47 of the *Constitution* of Kenya 2010 and Section 4 of the *Fair Administrative Action Act*.
- xvii. The 1st Respondent further; -
 - a. Appointed one Robert Gichura to be the Investigating Officer in to the matter [6 and the Petitioner requested for his disqualification from the Board due to conflict of interest but his request was quashed and Robert was appointed Secretary' of the Board.
 - b. Some of the 1st Respondent Board members used demeaning language and intimidated the Petitioner during the Inquiry proceedings and when the Petitioner requested for audio recording of the proceedings his request was ignored.



- c. Ignored and or denied the petitioner's request to be provided with evidence, witnesses and complaint to the allegations in order for cross-examination: and instead pressured the Petitioner to plead guilty and ask for forgiveness in case he wanted to retain his job.
 - d. Denied the Petitioner access to the- records x>f all individuals that were vetted for passports from Isloilo during his tenure to help disqualify the allegations made against him which violated the provisions of Article 47 and Article 50 of the Constitution of Kenya 2010 and Section 4 of the Fair Administrative Action Act.
- xviii. During the 1st Respondent Board Inquiry proceedings, the members of the Board, obtained and held printouts of the Petitioner's cellphone communications, messages printouts and bank statements that were used to ask him personal questions without sharing the same with him which amounted to infringement of his privacy contrary to the Provisions of Article 31 (c) & (d) of the Constitution of Kenya 2010.
- xix. The 1st Respondent Board further deviated from the allegations during the Inquiry proceedings and questioned the Petitioner about his other sources of living and demanded records of his Company's transactions which violated the provisions of Articles 20(1)(2) & (3), 21(1), 31 (c) & (d) of the Constitution of Kenya 2010.
- xx. After the Petitioner's interdiction on 25* of April 2022, the Petitioner received half his salary and house allowance which the 1st Respondent used to settle his Sacco loan dues and deposited only Kshs. 600/- in his Bank account. This was intentional punishment and violated the provisions of Article 41(1) and Article 28 of the Constitution of Kenya 2010.
- xxi. The Petitioner was not paid any dues covering leave days worked or salary earned/benefits by the 1st Respondent during the time he was on interdiction which violated the provisions of Article 41(1) and (2) of the Constitution of Kenya 2010.
2. The respondent filed a replying affidavit through one Vincent Cheruyiot on 26th April, 2023 in which it stated among others:
- a. That I am a male adult of sound mind and a Senior Human Resource Officer with the National Intelligence Service, the 1st Respondent herein. I am fully conversant with the facts leading up to this matter and hence competent to make this affidavit.
 - b. That I have read and fully understood and where necessary had explained to me by the State Counsel on record the tenor and purport of the Petitioner's Petition dated 5th December 2022, the Supporting Affidavit thereto and all the annexed documents referred to and I therefore swear this affidavit in response thereto.
 - c. That from the records held in the NIS Human Resource Department, the petitioner was appointed to the NIS effective 17th January 2017 vide letter dated 17th January 2017. (Refer to page 4 of the Petitioner's bundle of documents)



- d. That on 20th January 2017, the petitioner accepted the terms and conditions contained in the appointment letter dated 17th January 2017.
- e. That part of the conditions for employment of the Petitioner was to be subject to all rules and regulations for NIS officers as laid down in the NIS Act No. 28 of 2012 and as amended from time to time.
- f. That Section 16 of the [National Intelligence Service Act](#) which governs all NIS officers including the Petitioner before dismissal and Section 23 of the [National Intelligence Service Act](#) provide for the issuance of a Disciplinary Code and penalties provided under the disciplinary code in case of a breach.
- g. That the terms and conditions of service of NIS staff, to which the Petitioner was subject to, provide for dismissal of an officer found to have been in a breach of security and other acts of gross misconduct. (Annexed herewith at page 6-1 I and marked “CV-I are related excerpts from the Respondent’s Disciplinary Rules and Regulations.
- h. That the Petitioner having been assigned the sensitive and critical role of vetting applicants for passport issuance, was engaged in offensive acts of Soliciting and receiving bribes from officers and members of the public thus causing a breach of security, bringing the NIS into serious disrepute and this amounted to gross misconduct.
- i. That the Petitioner was issued with a notice to show cause on 25th April 2022 detailing the acts of gross misconduct he had committed. (Annexed herewith at page 12-13 and marked “CV - 2” is a copy of the show cause letter).
- j. That the Petitioner was given 14 days to file a response and show cause why disciplinary action should not be taken against him.
- k. That in view of the grave nature of offence he had committed and in accordance with the 1st Respondent’s Disciplinary Rules and Regulations (“DRR”), the Petitioner was interdicted from exercising his duties pending finalization of the case.
- l. That the Petitioner submitted a response to the show cause in a letter dated 5th May 2022. (Annexed herewith at page 14-15 and marked “CV - 3” is a copy of the response)
- m. That having been dissatisfied with the response to the show cause, a Board of inquiry was constituted on 3rd June 2022 to investigate whether the Petitioner contravened the provisions of the DRR and give the necessary recommendation.
- n. that the Board issued a notification to the Petitioner informing him that the inquiry will commence on 15th June 2022 and he acknowledged receipt of the notice on 8th June 2022. (Annexed herewith at page 16-17 and marked “CV - 4” is the Notification of Disciplinary Inquiry)
- o. That in the notification issued, the Petitioner was given an opportunity to call any witnesses to testify in his defence to the Board and he did not call any witnesses.
- p. That the petitioner appeared before the Board of Inquiry on 15th and 21st June 2022 and pleaded not guilty to the charges levelled against him. (Annexed herewith at page 18 - and marked “CV - 5” is a copy of the Plea)
- q. That during the Board proceedings, the Petitioner was presented with his bank statements for KCB Account Number 1117591646, Cooperative Bank 01*****000 and Equity Account



No. 012****53 and asked to explain the abnormal increase in the deposits in his accounts in excess of Ksh. 3,144,900 between November 2021 and March 2022 linked to a passport vetting syndicate. (Annexed herewith at pages 20 - 57 are the bank account statements marked “CV-6 (a) - (c)” and at pages 58-61 the respective account summaries marked “CV-6 (d)”).

- r. That analysis of the evidence revealed numerous links between the Petitioner and passport applicants and brokers including an inducement from one Said 0726****99, who incidentally got their passport cleared by the Petitioner.
 - s. That the Board gave the Petitioner an opportunity to examine the evidence, listen to the witnesses, and cross-examine them to ensure a fair hearing.
 - t. That the Board noted the Petitioner’s general conduct to be rude, arrogant, and dismissive of the inquiry where he often threatened to resign or appeal the verdict in a court of law with the extent of his disdain illustrated by his failure to honor his summons to appear before the Board of Inquiry on 29th June 2022.
 - u. That the Board having given the Petitioner every opportunity to defend himself in accordance with natural justice rules, recommended that the Petitioner be dismissed.
 - v. That the Petitioner was given an opportunity to submit a mitigation in accordance with the DRR which he did, dated 24th July 2022. (Annexed herewith at page 62 -63 and marked “CV-7” is a copy of the Mitigation Plea).
 - w. That to ensure the Petitioner receives a fair hearing, a Divisional Disciplinary Committee (“DDC”) was constituted in accordance with the DRR to independently evaluate and proceedings and recommendation of the Board.
 - x. That the DDC upon an independent evaluation of the board proceedings and its recommendations concurred that the Board accorded the Petitioner a fair trial.
 - y. That in a letter dated 23rd August 2022 the Petitioner was dismissed from employment with effect from 1st September 2022. (Refer to page 30 of the Petitioner’s bundle of documents)
 - z. That the DRR gave the petitioner an opportunity for further appeal if dissatisfied with the verdict of the DDC to the Service Disciplinary Committee and further to the Director General but the Petitioner did not find it necessary to exhaust these avenues.
 - aa. That the offences of Soliciting and receiving bribes from officers and members of the public, breach of Security are very serious offences which once committed totally undermine the suitability of any employee continuing in employment.
3. In the submissions in support of the Petition, Mr. Museve for the petitioner submitted among others that prior to the dismissal the petitioner never had any warning or disciplinary case against him. The dismissal therefore caught the petitioner by surprise. Counsel further submitted that upon interdiction the petitioner only received half his salary and house allowance which he used to settle his Sacco loan and deposited only Kshs. 600/- in his Bank Account. This according to counsel was intentional punishment and violated the provisions of article 4(1) and 28 of the *Constitution*. Counsel further submitted that the 1st respondent’s Board made six allegations against the petitioner however the Board tried him for only one count which was soliciting and receiving bribes from other officers or members of the public contrary to DRR 2.1. In addition the Board deviated from the allegations made against the Petitioner in the Notice to Show Cause letter dated 25th April, 2022. The Board questioned the



- Petitioner about his other sources of living and demanded records of his company's transactions which were not relevant to the case made against him by the Board.
4. Concerning discrimination, counsel submitted that the respondent consistently posted the petitioner to risky and hardship areas such as Wajir, Isiolo and Turkana areas which were miles away from the petitioner's home area of Kuria East Migori County. When the petitioner sought clarification from his supervisor he was advised to report first to his new station to allow the supervisor the matter on his behalf but this was never done. This according to the petitioner violated the provisions of article 27(4) and 41(1) of the Constitution.
 5. Concerning the disciplinary hearing, Mr. Museve submitted that the petitioner objected to one Mr. Robert Gichura as investigating officer as he was conflicted but the request was not heeded and Gichura was appointed Secretary to the Board. Further the respondent ignored the petitioner's request to be provided with evidence, witnesses and complaints and allegations against him but instead was pressured to plead guilty and ask for forgiveness in case he wanted to retain his job. Counsel further submitted that during the 1st Respondent's Board Inquiry proceedings, the members of the Board obtained and held print-outs of the petitioner's cellphone communications, messages and bank statements that were used to ask him questions without sharing the same with him. The according to counsel amounted to infringement of the petitioner's privacy contrary to provisions of article 31(1) (c) & (d) of the Constitution.
 6. The petitioner contended that the termination was substantively unfair because it breached the requirements of fair labour practices and impartial hearing as laid down under article 27 of the Constitution. The respondent breached the requirements of human dignity as laid down under article 28 of the Constitution, further the respondent breached the petitioner's right to privacy as provided for under article 31 of the Constitution. The termination was substantively unfair because the 1st respondent failed to discharge the statutory burden as it invited two witnesses to give evidence at the Board of Inquiry at which one Eric Bii testified that there was no evidence of the petitioner's involvement in any of the stated allegations made against him. This was further stated by the respondent's 2nd witness Mr. Ahmed Mohammed. This therefore showed that the allegations against the petitioner were malicious.
 7. Mr. Museve further submitted that the termination was procedurally unfair and was contrary to section 45(2), (a), (b) (c) of the Employment Act and section 4 of the Fair Administrative Action Act because the 1st Respondent denied the petitioner a chance to cross-examine Mr. Eric Bii and refused to show him the contents of the confidential report submitted by him.
 8. Mr. Mulili for the respondent on the other submitted that part of the petitioner's conditions for employment was that he would be subject to all rules and regulations for NIS officers as laid down in the National Intelligence Service Act No. 28 of 2012. Section 16 of the Act governed all officers including the petitioner before dismissal and section 23 provided for the issuance of a disciplinary code and penalties provided under the disciplinary code in case of breach of terms and conditions of service by NIS staff. The petitioner was found in breach of the code in that he was found guilty of breach of security and other acts of gross misconduct. The petitioner was accused of engaging in a passport vetting fraud syndicate between the year 2021 and 2022 where he solicited and received bribes from officers and members of the public thus causing breach of security, bringing NIS into serious disrepute contrary to the 1st respondent's disciplinary rules and regulations (DRR).
 9. According to counsel the petitioner submitted a response to the show cause letter dated 5th May, 2022 and the respondent not being satisfied with the petitioner's response, constituted a Board of Inquiry on 3rd June, 2022 to investigate whether the petitioner contravened the provisions of DRR and the



Board gave necessary recommendation. The Board issued a notification to the petitioner informing him that the inquiry will commence on 15th June, 2022 and the petitioner acknowledged receipt of the notice on 8th June, 2022. In the notice issued the petitioner was given an opportunity to call any witness to testify in his defence but he did not call any witness.

10. Mr. Mulili further submitted that during the Board proceedings, the petitioner was presented with his Bank statements for KCB Account Number 11*****46, Cooperative Bank 011*****00 and Equity Account No. 012*****53 and asked to explain the abnormal increase in the deposits in his accounts in excess of Kshs.3,144,900/= between November 2021 and March, 2022 linked to a passport vetting syndicate. Further analysis of the evidence revealed numerous link between the petitioner and passport applicant and brokers including an inducement from one said 0726****99, who incidentally got their passport cleared by the petitioner. According to counsel, the Board gave the petitioner an opportunity to examine the evidence, listen to the witnesses and cross-examine them to ensure a fair hearing. The Board noted the petitioner's general conduct which according to them was rude, arrogant and dismissive of the Inquiry and often threatened to resign or appeal the verdict in Court of law. The Board having given the petitioner every opportunity to defend himself in accordance with the rules of natural justice, recommended that the petitioner be dismissed.
11. On the appropriateness of the petition, Counsel submitted that the same was premature as it failed to exhaust internal remedies. The DRR gave the petitioner an opportunity for further appeal if dissatisfied with the verdict of DDC, to the Service Disciplinary Committee and further to the Director General but the petitioner did not find it necessary to exhaust the internal appeal process. He instead rushed to court through this petition. Failing to exhaust the appeal mechanism makes the petition premature hence should be struck out. In this respect, Counsel relied on section 9(2) of the *Fair Administrative Action Act* which provides that the High Court or subordinate Court shall not review an administrative action or decision under the Act unless the mechanism including internal mechanism for appeal or review and all remedies available under any other written law are first exhausted. Counsel further relied on the case of *Robert Khamala Situma & 8 Others v Acting Clerk of the Nairobi City Assembly* [2022]eKLR.
12. On the issue whether the termination was unlawful, Counsel submitted that the termination was lawful and fair. In this respect Counsel relied on the provisions of sections 41, 43 and 45(2) of the *Employment Act*. According to Counsel, section 41 was fully complied. The petitioner was served with a show cause letter for gross misconduct dated 25th April, 2022 containing clear details of the offences that he was charged with. He was subsequently charged with the offences of engaging in offensive acts of soliciting and receiving bribes from officers and members of the public, breach of security, bringing the service into the disrepute and engaging in gross misconduct. The charges were brought under NIS Disciplinary Rules and Regulations. The Board followed due procedure and found the petitioner guilty of the charges against him. In this respect Counsel relied on the case of *British Leyland UK Ltd v. Swift* [1981]. I.R.L.R. 91 per Lord Denning.
13. On the question whether the petitioner has demonstrated a violation of his rights under the *Constitution*, Mr. Mulili submitted that the issues raised in the petition were ordinary employment and labour relations dispute disguised as a constitutional issue contrary to the provisions of article 162(2) and 165(5) of the *Constitution* as read together with section 12 of the *Employment and Labour Relations Court Act*. The petition ought to have been presented as an ordinary claim. Counsel further submitted that the *National Intelligence Service Act* under part IV thereof provide for limitation of rights and freedoms of persons who are subject to investigations by the service or suspected to have committed an offence to the extent that subject to section 42, the privacy of a person's communication may be investigated, monitored or otherwise interfered with. The Service shall prior to taking any



- action under the section obtain a warrant. In the light of the foregoing provision, counsel submitted that the petitioner’s contention that his right to privacy was violated cannot stand.
14. Further on the. Issue of violation of Constitutional rights, counsel submitted that it was trite law that when someone alleges breach of constitutional right, such person must prove such assertion. It was not sufficient to simply state that a certain article of the Constitution has been breached without stating with proof, exactly how it was breached as the petitioner has done in this case. In this regard, counsel relied on the case of Stephen Nyarangi Onsoma & Another v. George Magoba & 7 others [2014]eKLR and Mumo Matemu v. Trusted Society for Human Rights Alliance & 5 others [2013] eKLR among others.
 15. The respondent raised a fundamental question of vital importance in deciding this petition. This is the issue of the exhaustion principle encapsulated under section 9 of the Fair Administrative Action Act. Under subsection 2, the High Court (read ELRC) or a subordinate Court shall not review an administrative action or decision under the Act unless the mechanism including internal mechanism for appeal or review and all remedies available under any other written law are first exhausted. Subsection 3 empowers a court confronted with an application where the internal appeal processes have not been exhausted to direct that the applicant shall first exhaust such remedy before instituting the proceedings before the Court. In the case of Speaker of National Assembly v Karume [1992] KLR 21 the Court of Appeal therein observed:

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures”.
 16. The petitioner did not deny that he never appealed against the decision to terminate his service as provided in the DRR read together with section 9(2) of the Fair Administrative Action Act. Further in his affidavit in support of the petition, the petitioner raised fundamental questions of fair hearing. That is to say that despite the fact that Mr. Bii and Mr. Mohammed testified that there was no evidence to back the allegations against the Petitioner, the respondent still went ahead and dismissed him. The Court would take seriously such allegation and if found credible would overturn the verdict of dismissal. However the Court is required by law where a party has not exhausted the express provisions of a statute requiring that a dispute be subjected to internal dispute resolution mechanism, to direct that the same be done first. The petition herein was filed almost a year ago and it would have been desirable if the respondent raised the issue of exhaustion of internal dispute resolution mechanism at the earliest opportunity and called for the Court’s direction thereon. This was not done but it’s not too late for the Court to direct that the petitioner exhausts first, the internal dispute resolution mechanisms as provided in the 1st respondent’s DRR as read together with section 9 of the Fair Administrative Action Act.
 17. From the foregoing observations it has become inevitable that the petition herein will be ordered stayed pending exhaustion of the respondent’s internal dispute resolution mechanisms. The Court however directs that such resolution be done within the following timelines: That is to say the petitioner shall file his appeal within 30 days of this ruling and the respondent’s appeals panel shall consider and hear, determine the appeal within 30 days after filing and that the petition be mentioned on 11th December, 2023 for further directions.
 18. It is so ordered.



DATED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2023.DELIVERED VIRTUALLY THIS
27TH DAY OF OCTOBER, 2023

ABUODHA JORUM NELSON

JUDGE

