



REPUBLIC OF KENYA



Kibusion v Board of Management, Kimng'orum Girls High School (Employment and Labour Relations Petition E002 of 2023) [2023] KEELRC 2586 (KLR) (24 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2586 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS PETITION E002 OF 2023
HS WASILWA, J
OCTOBER 24, 2023

BETWEEN

SARAH JEPCHIRCHIR KIBUSION PETITIONER

AND

THE BOARD OF MANAGEMENT, KIMNG'OROM GIRLS HIGH SCHOOL RESPONDENT

JUDGMENT

1. By a petition dated 16th February, 2023, the petitioner sought for the following reliefs; -
 - a. A declaration that the Respondent's secretary deployment letters dated 1st October, 2019, 31st January, 2020 and 22nd January, 2021 unilaterally altering the petitioner's employment was unfair, unjustified and amounted to unfair termination, unfair labour practices, unconstitutional null and void.
 - b. A declaration that the suspension of the petitioner vide a letter dated 23rd March, 2021 and extension of the said suspension vide letter dated 10th May, 2021 are illegal, null and void ab initio for being in contravention of Articles 25(c), 27, 28, 41, 47, 48, 50 and 236 of *the Constitution* of Kenya.
 - c. A declaration that the disciplinary meeting of the Respondent of 7th July, 2021 and outcome thereof was unprocedural, unjust, wrongful, unlawful and unconstitutional and in contravention with Articles 25(c), 41, 47, 48 and 236 of *the Constitution* of Kenya.
 - d. A declaration that the petitioner's dismissal and or termination of her employment was illegal, wrongful, unfair, un-procedural, unconstitutional and unlawful hence null and void ab initio.



- e. An order for judicial review by way of certiorari to bring to this honourable court for purposes of quashing the decision of the respondent of altering the petitioner's employment, suspending the petitioner and terminating her employment.
- f. An order of reinstatement or re-engagement to employment with full pay, all benefits or seniority and allowances from the date of purported suspension to the date of judgement.
- g. In the alternative to (f) above, an order for full pay from the date of purported termination up to the date of judgement and compensation for unlawful and unfair termination equivalent to her 12 months gross salary plus one-month salary in lieu of notice.
- h. General damages for breach of the petitioner's rights guaranteed under Articles 25(c), 28, 41,47, 48, 50 and 236 of *the Constitution* of Kenya.
- i. That the Respondents do bear the costs of this Petition.
- j. Any other relief this Honourable court may deem fit grant.

Petitioner's case.

2. The petitioner states that she was employment by the Respondent as the school Bursar on permanent and pensionable terms with effect from 7th June, 2012 earning a monthly salary of Kshs 8,000.
3. That she served the Respondent diligently and with full dedication until 1st October, 2019, when she resumed work from her maternity leave, that she was deployed to the Library department to be the head of library when there was no such position in the school.
4. She took issue with the fact that the deployment was done in her absence, without any consultation. Dissatisfied with the deployment she institution a suit in the Magistrates Court at Ravine under case number PMCC case No. 1 of 2020, which was however compromised and the parties recorded a consent for her reinstatement to her former position as the Bursar. It is stated that this order was adopted an order of the court.
5. To give effect to the said Orders, the Petitioner states that on 20th February, 2021, she was invited for a meeting where the Respondent verbally confirmed her reinstatement to her former position as the school bursar.
6. Before resuming her position, she was re-deployed to Accounts office as accounts clerk by the letter dated 22nd January, 2021 and ordered to immediately sign the letter in acceptance thereof, which the petitioner declined.
7. Due to her adamancy in accepting the new position and signing the offer letter, she was served with a notice to show cause dated 1st March, 2021, citing her for insubordination and absenteeism and requiring a response to be submitted within 7 days.
8. Aggrieved by the way the Respondent was forcing her to accept another position and being that the Respondent was now in contempt of the consent orders, the Petitioner filed contempt of Court Application in Ravine on 9th March, 2021. Upon learning the contempt of Court application, the Respondent suspended the Petitioner for one month and on expiry, extended the suspension indefinitely.



9. It is stated that the petitioner remained on suspension till 23rd June, 2021, when she was invited for disciplinary hearing scheduled for 30th June, 2021. However, on 25th June, 2021 the petitioner took ill and sought medical attention at Tenges healthy centre where she was given bedrest for 7 days with a follow up check-up scheduled for 30th June, 2021.
10. The Petitioner stated that she communicated her nonattendance to the Respondent's secretary and shared the treatment notes. She was excused and the Respondent adjourned the disciplinary meeting to 7th July, 2021 however she could not attend the meeting because she was still unwell and under strict instruction of the doctor to take bedrest.
11. It is her case that while she was still recuperating, she received a letter on 19th July, 2021, dismissing her service with immediate effect.
12. In the meantime, the court in Ravine delivered its ruling on the contempt of Court Application, finding the secretary of the Respondent in contempt and fining her Kshs 50,000. That the Respondent paid the said sum of money but did not appeal the decision, therefore they were still required to purge the contempt and vacate all notices and disciplinary proceedings, which caused her dismissal.
13. The legal basis of the petition is that the petitioner's fundamental freedom from discrimination right to fair labour practices, right to fair administrative action, right to human dignity and right fair hearing were infringed.
 - i. Article 10 of *the Constitution* 2010 establishes National values and principles of governance that bind all the state organs, public officers and all persons. The respondent is expected in applying any law be guided by the same.
 - ii. Article 19 of *the Constitution* of Kenya 2010, guarantees the petitioner the rights and fundamental freedoms.
 - iii. Article 20 of *the Constitution* on the bill of rights applies to all state organs and all persons, whereas the Respondent was expected to abide by.
 - iv. Under Article 22 of *the constitution*, it gives the Petitioner the Locus standi to institute this petition against the respondents for purposes of claiming rights and freedoms that have been denied, infringed or is threatened.
 - v. Article 23(3) of *the constitution* outlines remedies available when rights of an individual are infringed. It provides as follows: "In any proceedings brought under Article 22, a court may grant appropriate relief, including-
 - (a) a declaration of rights;
 - (b) an injunction;
 - (c) a conservatory order;
 - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24 (e)An order for compensation and
 - (f) an order of judicial review." 27. Article 24 of *the constitution* guarantees that any limitation to the



enjoyment of the rights and fundamental freedoms under *the constitution* cannot be unreasonably limited.

- vi. Article 27 of *the Constitution* provides for equality and freedom from discrimination and in particular provides that:
 - a) Every person is equal before the law and has the right to equal benefits of the law.
 - b) Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres.
 - c) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- vii. Article 41 of *the Constitution* guarantees the protection of right to labour practices, whereas the Respondent has openly violated the Petitioner's Constitutional fair labour practices.
- viii. Article 47 of *the constitution* entitles every person an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. This right has been blatantly violated by the Respondents having unlawfully terminated the Petitioner's employment unfairly, un-procedurally, unlawfully and without any justifiable cause or reason.
- ix. By dint of Article 47 (1) and (2) of *the Constitution*, the Petitioner was entitled to fair administrative action being:
 - a) A right to administrative action which expeditious, reasonable and procedurally fair
 - b) If a right or fundamental Freedom of a person who has been or is likely to be adversely affected by an administrative action the person has a right to be given a written reason for the action.
 - c) Parliament is enjoined to enact legislation to provide for review of administrative action by a court if appropriate by independent and impartial tribunal and promote efficient administration; in this case parliament enacted the Fair Administrative Actions Act no. 4 of 2015.
- x. Article 50 of *the constitution* guarantees right to every person to have his dispute if any resolved by the application of the law in fair and public hearing by a competent judicial body. This particular constitutional provisions has been infringed by the respondents who unilaterally sat without involving the petitioner and terminated her employment without hearing her.



- xi. The Petitioner avers that she was legally in employment with the Respondent who terminated her employment without following the due process of the law. The petitioner was not accorded a hearing as required under Section 41 of the *Employment Act*, Section 4 of the *Fair Administrative Action Act* and Article 47 and 50 of *the Constitution* and by so doing she was discriminated contrary to Section 27 of *the Constitution* and denied fair hearing as contemplated in *the Constitution* and the Statutory provisions.
- xii. The Petitioner avers that as a public servant she was unfairly treated by the respondent when she was demoted in rank, removed from office, subjected to disciplinary action contrary to the due process of law and eventually dismissed in violation of her constitutional rights enshrined under Article 236 of *the Constitution*.
- xiii. The Petitioner further avers that the illegal and unlawful termination of her employment was in contravention of existing court orders which is an infringement of the petitioner's right to human dignity social justice under Article 19 and 28 of *the Constitution*.
- xiv. The Petitioner further avers that the resultant disregard to the Court orders issued at Eldama Ravine Court reinstating her to her substantive position as a bursar and further dismissal of her employment while there were subsisting court order undermines the Petitioner's human rights and fundamental freedoms, the rule of law and contributes to bad governance which is contrary to provisions of Article 259 of *the Constitution*.
- xv. The Respondents illegal and unlawful acts are contrary to *the constitution* and all the statutory provisions of the law i.e *Employment Act* No. 11 of 2007 and Fair Administrative Actions Act, No. 4 of 2015.
- xvi. The Respondent has failed as a public entity to manage public institution and maintain high values and principles of public service, by not upholding high standards of professional ethics and accountability when taking administrative action against the Petitioner, a breach of the Petitioner's Constitutional right under Article 232 of *the Constitution*.
- xvii. Article 236 of *the Constitution* of Kenya 2010 protects the Petitioner's rights as a public officer from being subjected to illegal and unlawful disciplinary process.
- xviii. Article 258 of *the Constitution* of Kenya 2010 gives the Petitioner mandate in her own capacity to institute court proceedings and enforce her Constitutional rights which have been blatantly infringed by the respondents.
- xix. Article 162 of *the Constitution* creates this court and Article 159 establishes the judicial authority and bestows on this court the mandate to exercise that authority.

Respondent's case

14. The Respondent entered appearance through the Honourable Attorney General and filed a response to the petition by a replying affidavit of Chirchir Joice, the secretary of the Respondent and the



- principal of Kimng'orem Girls High School sworn on 9th March, 2023. The affiant admitted that the petitioner was employed by the Respondent as a bursar with effect from 7th June, 2012. However, that she did not do her work diligently as she was involved in several disciplinary issues such as insubordination and absenteeism.
15. She states that the Respondent is tasked under section 59 of the *Basic Education Act*, inter alia to; recruit, employ and remunerate non-teaching staff as may be required by the institution to facilitate the implementation of its function under the Act.
 16. Pursuant to this functions and considering the unbecoming conduct of the petitioner, the Respondent was forced to carry out disciplinary action against the petitioner as evidenced by the letters of 1st March, 2021, 23rd March, 2021, 10th May, 2021, 23rd June, 2021 and 30th June, 2021 which were all done in line with the Fair Administrative Actions Act and the *Employment Act*.
 17. It is her case that the petitioner was served with a notice to show cause why disciplinary action should not be taken against her on the allegations of insubordination, absenteeism, failure to perform his duties, gross misconduct and negligence of duty.
 18. She states that these disciplinary proceedings took place between March and June, 2021 and the said proceedings were not barred by the Court orders issued both on 12th February, 2020 and 7th December, 2020. Also that the Orders of 7th December, 2020 are contested by the Respondent application of 30th March, 2021.
 19. It is averred that the petitioner's Application dated 30th August, 2021, seeking to quash the Notice to show cause, the suspension letter, the letter extending her suspension and the letter inviting her for disciplinary hearing dated 1st March 2021, 23rd March 2021, 10th May 2021, 23rd and 30th June, 2021 respectively and to quash the termination of her employment by the letter dated 19th July, 2021 was dismissed on 21st December, 2021 for being premature.
 20. It is the Respondent's case that the disciplinary proceedings instituted against the petitioner herein were distinct and separate from the proceedings of the Court in Ravine ELRC Case number 1 of 2020 that issued the consent orders of the Court of 7th December, 2020.
 21. The deponent contends that the issues raised in the current petition such as reinstatement, question of the disciplinary action and compensation for loss of employment raises new causes of action separate from those raised in the Memorandum of Claim dated 12th February, 2020 therefore is an abuse of court process and should be dismissed with costs.
 22. She avers that the issue of redeployment to the accounts department as Accounts clerk was discussed and resolved and the petitioner agreed to serve the school as accounts clerk as per minutes of 19th February, 2021. In any case that the employment letter between the petitioner and the Respondent did not preclude the Respondent from deploying the claimant to any other department. Further, that Accounts clerk and bursar carry out similar duties as such there was no loss on the petitioner.
 23. The affiant avers that despite deploying the petitioner to be the accounts clerk, the petitioner developed a habit of absenteeism and insubordination leading to the disciplinary action which were carried in line with the law that eventually led to her termination.
 24. She maintains that it never violated any of the petitioner rights and freedoms to warrant the filling of the petition herein. She also adds that the Ravine Case number 1 of 2020 is still pending hearing and determination.



Rejoinder

25. In response to the replying affidavit, the petitioner stated that the affidavit is riddled with falsehood and contradictions and the Court should not rely on it.
26. She stated that any party whose constitutional rights to employment and fair labour practices have been violated always has a recourse at this Court as it's the only court that can address violation of constitutional employment rights.
27. It is her case that Chirchir Joice, the Respondent's secretary and the principal of the school upon being posted to the school engaged in financial malpractice by receiving money personally from parents that's meant for student bread and divert it for her own personal use and direct the petitioner to look for ways of buying bread for the said student, a fact that she reported to the Joe Koima, the chairperson of the Respondent, in the email of 16th January, 2022 marked as SJK18. That Madam Joice Chirchir did not take the issue lightly and promised to make sure her services are terminated.
28. The petitioner states that the respondent's secretary actualized her threats, when she went for maternity and upon her return she was re-deployed to serve in the library, which was non-existent at the time and her position advertised on 13th January, 2020. She protested the redeployment and since no action was taken she filed the case in Ravine ELRC Case no. 1 of 2020 seeking interalia to stop any employment of a new bursar.
29. The suit did not proceed to full hearing because the parties agreed to record a consent in Court, however on implementation of the consent the Respondent offered her a new position being Accounts clerk, which position was not existent either.
30. She states that the deployment to library and accounts clerk was in violation of the claimant contract of employment which is tantamount to dismissal.
31. On the allegations of insubordination and absenteeism, the petitioner stated that these are other schemes that the Respondent employed to malign her name in the bid to terminating her employment.
32. The petitioner stated that she only agreed to the terms of the letter of 1st March, 2021 after having a session with the Respondents' board which had agreed to retain her as a bursar and not accounts clerk. She added that the said letter was written by the Respondent's secretary.
33. The Petitioner stated that she responded to the show cause letter however due to illness, she was unable to attend the hearing, an issue which she informed the Respondent but the Respondent, determined to terminate her, rescheduled the disciplinary hearing and eventually terminated her from employment.
34. She stated that the Respondent instituted disciplinary proceedings while defying orders issued by the court on 7th December, 2021. Further that the Orders issued on 21st December, 2021 were erroneous because they were issued in disregard of the fact that the matter had been fully settled and the fact that her application of 30th August, 2021 subject of the said ruling sought compliance of reinstatement order and not any interim orders.
35. She maintained that the issues raised in the memorandum of claim dated 12th February, 2020 were fully determined by consent and the issues raised in this petition raises new issues emerging from the consent order that link the said consent and her unfair termination from employment.
36. She denied being in attendance of the meeting of 19th February, 2021 and thus did not participate in any deliberation of the said meeting. She maintained that she instituted this petition protesting the violation of her constitutional rights and eventual termination.



37. The petition was canvassed by written submission with the petitioner filing on 18th September, 2023 and the Respondent on 26th September, 2023.

Petitioner submissions.

38. The Petitioner submitted on three issues; whether the Respondent's actions of deploying petitioner as head of library was procedural, justified and amounted to termination of the employment, whether the petitioner rights were violated through unfair termination of her employment and whether the petitioner is entitled to the reliefs sought.
39. On the first issue, it was submitted that the petitioner was employed as a bursar on permanent and pensionable terms but the Respondent unilaterally deployed her to serve in the library then as accounts clerk, which deployment was in violation of her right to fair labour practices enshrined under Article 41 of *the Constitution*, violation of her protection as a public officer under Article 236 and violation of section 10(5) of the Employment that prohibit unilateral change of terms of employment.
40. It was submitted that the unilateral move by the Respondent to alter the petitioner's employment was a clear scheme to terminate the petitioner's employment unprocedural as evidenced by the advertisement done on 13th January, 2020, therefore their actions were motivated by malice, unfair and unjustified. To support this position the Petitioner cited the case of Elizabeth Kwamboka Khaemba Vs BOG Cardinal Otunga High School Mosochi & 2 others[2014] eKLR where the Court held that:-
- “The key position is that the employer cannot alter the employees employment contract without consulting the employee. The wording of the section is couched in mandatory terms an indication that the employer cannot unilaterally revise the contract unless there is consultation. In the current case there was no consultation and the decision to change the duties and position of the claimant was made and is shrouded, in malice as an extension of the “disciplinary” process instigated against the claimant. The end result of changing the claimants contract without consultation with her is tantamount to terminating the existing contract and therefore amounts to an unfair and unjustified termination.”
41. Accordingly, it was submitted that the redeployment was in violation of Article 19, 28, 41, 47 and 236 of *the Constitution* and urged this Court to find the re-deployment unfair, illegal and amounts to unfair termination.
42. On the second issue, it was submitted that the termination letter of 19th July, 2021 did not make reference to any disciplinary process followed, a confirmation that the termination was unfair. Furthermore, that the dismissal letter did not indicate the position the petitioner was being dismissed from, a further confirmation that the dismissal was flawed and predetermined.
43. It was argued that the Orders of the Magistrates court of 7th December, 2020 reinstated the petitioner unconditionally to her position as the bursar but the Respondent defied the said orders and instead deployed the petitioner to be an accounts clerk by a letter of 22nd January, 2021, which the Petitioner declined by its letter of 1st March, 2021. Upon declining to sign the said letter deploying her to accounts office, the Respondent cited the petitioner for insubordination and new issues were raised such as absenteeism. Consequently, a show cause letter was issued, together with a suspension letter dated 23rd March, 2021 for a period of one month. Upon lapse of the suspension, she was suspended indefinitely by the letter of 10th May, 2021.
44. Based on the foregoing, the Petitioner submitted that the suspension was illegal and unfair because it's was triggered by the deployment which was outrightly illegally and in violation of the Court orders



issued by the Magistrates Court that required her to be reinstated to the position of bursar and not any other position. Secondly that the suspension took more than three months before she was invited for disciplinary hearing, a period which was excessive and unreasonable. In this they relied on the case of *Chrispus Ileli Kunuwa V County Government of Kitui* and another [2020] eKLR.

45. It was also submitted that the suspension without pay for the three months was a nullity. In this they relied on the case of *Chief Justice and President of the Supreme Court of Kenya & Another Vs Khaemba* Civil Appeal No. 533 of 2019[2021] {KECA} 17th December, 2021 where the Court held that; -

“The terms of a statute withholding pay to an employee are essentially of a penal nature, and like all penal provisions must be construed restrictively, and a person should not be penalized except under clear law. The term penal and the rule against doubtful penalisation is explained as follows in *Halsbury’s Laws Vol 44 (1)* at paragraph 1240:“... the true test is now considered to be whether a particular construction inflicts a detriment, or greater detriment on persons affected. A law that inflicts hardship or deprivation of any kind on a person is in essence penal. There are degrees of penalisation but the concept of detriment inflicted through the state’s coercive power pervades them all. The substance, not the form of the penalty is what matters. The law is concerned that a person should not be put in peril of any kind upon an ambiguity, hence the principle against doubtful penalisation.”

46. It was submitted further that the suspension of the claim was done in retaliation of the orders issues in favour of the Petitioner. Furthermore, that being a public officer, she is protected under Article 236 of *the Constitution*, that requires any action against a public officer to be done in accordance with Article 47 of *the Constitution* as read with sections 41, 43, 44, 45 and 47 of the *Employment Act*.
47. The Petitioner submitted that even though an administrative action is a prerogative of an employer, the termination ought to be grounded on both valid reason and fair process as was held in *Galgal Jarso Jillo Agricultural Finance Corporation*[2021] eKLR where the Court held that;-

“... First, an employer may not terminate an employee except for good cause. Some of the grounds that constitute good cause under section 41 of the Act are: poor performance; physical incapacity; and gross misconduct. Section 40 of the Act provides redundancy as the other substantive ground for termination but which is unrelated to those set out under section 41. But even where there exists substantive ground(s) to justify a termination, the law obligates the employer to observe certain procedural strictures to ensure the upholding of the broad principles of natural justice in processing the separation between him/her and the affected employee. The employer has to: provide the employee with details of the accusations against the employee; allow the employee an opportunity to respond to the charges; allow the employee to be accompanied by a shop steward or co-employee of his choice during the process; and finally provide the employee with a decision either terminating or saving the contract of service. Where the employer fails to do the foregoing, the resultant termination is deemed unlawful. And in law, the burden of justifying the lawfulness of the termination both in terms of whether there was a substantive ground to terminate and whether procedure for release of the employee was adhered to lies with the employer.”

48. Accordingly, it was submitted that the reasons given for termination was not justified. Firstly, because the allegation of insubordination was based on the illegal deployment to account office which was in breach of both her employment letter and an express Order which had directed the Respondent to



reinstate her to be her former position as a bursar. He argued that to demand compliance of Court orders cannot be turned to mean insubordination. In this she relied on the case of Edward Otsieka Opiayo Insurance Regulatory Authority[2020] eKLR where the Court held that;-

“with respect to insubordination, I do not find that the Board was unsubordinated in any way. In Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR Rika J held that insubordination was defined by the Mississippi Supreme Court in the case of Sims Vs. the Board of Trustees Holly Springs Municipal Separate District School, 414 SO. 2d 431 [Miss. 1982], as “ a constant or continuing intentional refusal to obey direct or implied order reasonable in nature, and given by and with proper authority.” Insubordination may also occur where the Employee engages his Manager or Supervisor in an un-appropriate verbal confrontation.

Under the Employment Act 2007, both forms of insubordination are captured under Section 44 [4] [d] and [e]...”

Applying the foregoing authority to the facts of this case this case, I find that the respondent has not proved that the words uttered by the claimant amounted to insubordination of the respondent’s Board since the claimant did not disobey any lawful command from the board.”

49. On the reason of absenteeism, it was submitted that the petitioner explained herself for all the days absent and maintained that she has never been absent from work without permission. Further that on the few days that she did not sign attendance register, the Respondent’s secretary had decline to allow her sign the log in log out book and thus the same failure cannot be used against the petitioner. In this the petitioner cited the case of New World Stainless Steel Limited Cosma Mbalu Munyasya [2021] eKLR where the Court held that;-

“...Absconding or deserting duty is not the same as absenteeism in that an absconding or deserting employee has formed the intention not to return to work. This distinction was well captured in the persuasive South African case of Seablo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)... And how does an employer discharge its burden in proving that an employee has absconded duty? Case law has firmly established that an employer alleging that an employee has absconded duty is required to show efforts made to reach out to the employee with a view to putting them on notice that termination of their employment on this ground is being considered”

50. On whether due process was followed, the petitioner submitted that she was invited for a disciplinary hearing three months after being suspended without pay, an issue that is in violation of Article 47 of the Constitution on fair Administrative action. Further that upon being invited she took ill and promptly communicated this to the Respondent at three instances but the Respondent went ahead and dismissed her from employment when she was unwell and on bedrest. Furthermore, that her termination without due process was in violation of section 41 of the Employment Act as read with Articles 41 and 47 of the Constitution. To support this the petitioner relied on the case of Gladys Wambui Mwai V Highland Plants Limited [2019] eKLR where the Court held that; -

“The Claimant’s dismissal was executed in a heartless fashion. The Respondent failed to accord the Claimant the safeguards under Section 41 of the Employment Act more so when it was aware that the Claimant was in hospital. It is asinine to postulate that she was not unwell and therefore could attend the disciplinary meeting when her child had been admitted at the hospital. Even if there was cause to dismiss, which cause the Respondent did not prove,



there was no need to execute the dismissal without adherence to the law. In this case the employer woefully failed to apply the provisions of Section 41 and thereby rendering the dismissal unlawful and unfair.”

51. The petitioner also took issue with the fact that the letter of termination indicated that the disciplinary hearing was conducted on 19th July, 2021, a date, which the petitioner was not aware of. Further that the minutes of 19th February, 2021 were not signed and thus cannot be taken in evidence in support of the defence case.
52. On whether the petitioner is entitled to the reliefs sought, it was submitted that the termination of the petitioner’s employment was done in violation of the employment contract, the *employment Act* and *the Constitution* of Kenya under Articles 25(c), 27, 28,41,47,48,50 and 236 and therefore the petitioner of is entitled to compensation. To support the award of compensation, the petitioner cited the case of Lt. Col(Rtd) Richard Ncharpi Leiyagu V Chief of Kenya Defence Forces and 2 others [2015] eklr where the petitioner was awarded Kshs 3,500,000 for violation of his constitutional right. Also in the case of Kaaimba Mangaara V Tharaka Nithi County Government [2018] eklr where the Petitioner was awarded Kshs 5,000,000 for infringement of his constitution rights.
53. Similarly, the petitioner herein urged this Court to allow the suit herein and award Kshs 6,000,000 for violation of her constitutional rights taking the current inflation rate into consideration.

Respondent’s submissions.

54. The Respondent submitted on four issues; whether the petition has satisfied the prerequisites of a constitutional petition, whether the court should consider a constitutional question if the remedy is available under some other legislative provisions, whether this Court can entertain this petition when there is another pending suit between the same parties on same subject matter in Eldama Ravine Court and whether the Respondent can be subjected to reinstate the petitioner.
55. On the first issue, it was submitted that the Petitioner has failed to state with reasonable precision the constitutional rights that have been violated or threatened with violation and how they are violated as is required of a constitutional petition. In this they relied on the case of Anarita Karimi Njeru Republic [1979] eklr and the case of Mumo Matemu V Trusted Society of Human Rights Alliance and 5 others [2013] eklr where the Court held that; -

“It is our finding that the petition before the High Court was not pleaded with precision as required in constitutional petitions. Having reviewed the petition and supporting affidavit, we have concluded that they did not provide adequate particulars of the claims relating to the alleged violations of *the Constitution* of Kenya and the *Ethics and Anti-Corruption Commission Act*, 2011. Accordingly, the petition did not meet the standard enunciated in the Anarita Karimi Njeru case.”

56. It was submitted that the orders sought in this petition are ordinary orders that can be sought in an ordinary claim under the *Civil Procedure Act* and Rules. He argued that the petition has been filed contrary to the position that a constitutional petition can only be raised when there is no other recourse available for disposing off the matter. In support of this they relied on the case of John Harun Mwau V Peter Gastrow & 3 others [2014] eklr where the Court held that;-

“Courts will not normally consider a constitutional question unless the existence of a remedy depend on it; if a remedy is available to an applicant under some other legislative provision or some of the basis, whether legal or factual, a Court will usually decline to determine whether



there has been in addition to a breach of the other declaration of rights. It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be involved at all.”

57. The Respondent reinforced its argument by relying on the case of Minister of Home Affairs V Bickles & others [1985] LRC Cost 755 and the case of Uhuru Muigai Kenyatta V Nairobi Star Publications Limited [2013] eKLR where Lenaola J (as he then was) held that:-

“Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG vs S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”

58. Accordingly, that issues to deal with termination of employment, reinstatement of employee and compensation on alleged unfair termination can be raised through an ordinary claim. Similarly, that the issues raised herein should have been substantially handles in the claim filed in Ravine under case number PMCC ELRC No. 1 of 2020 and not filed afresh in this petition.

59. The Respondent submitted that the petition is forum shopping since there are pending proceedings in Eldama Ravine Court and the proceedings herein is an abuse of Court process. In this they relied on the case of Republic V Paul Kihara Kariuki, Attorney General & 2 Others Ex parte Law Society of Kenya [2020] eKLR where the Court held that; -

“A second trial on the same issues would entail duplication of work as evidence required to prove those issues in the first suit would be similar to those in the second suit (read instant suit). Thus, it is desirable that such issues be resolved or adjudicated by one court only. It will avoid conflicting decisions or complications arising therefrom.”

60. On the reason for termination, the Respondent submitted that the petitioner herein was terminated for absenteeism, insubordination among other reasons. It was argued that the disciplinary action taken against the petitioner between March and June, 2021 was not barred by the Court, rather that the court had issued conservatory orders against the Respondent from employing another bursar in place of the claimant which orders were obeyed but that the petitioner continued with her gross misconduct necessitating the disciplinary action against her.

61. It was argued that deployment of an employee to any department is a prerogative of an employer that is guided by the ministry of education. In any case that the deployment was not any punishment on the petitioner.

62. On whether due process was followed, it was submitted that the Respondent invited the petitioner on various occasions for disciplinary hearing, which petitioner ignored all the invitation forcing the Respondent to terminate her services. It was argued that the allegations that the petitioner took ill is not supported by any evidence and the same should not be relied upon by this court. To support this they relied on the case of Mary Chemweno Kiptui V Kenya Pipeline Company Limited [2014] eKLR where the Court held that:-

“before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice,



given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee. It is now established best practice to allow for an appeal to such an employee within the internal disputes resolution mechanism and with due application of the provisions of section 5(7) (c) of the *Employment Act*. Where this procedure is followed an employer would have addressed the procedural requirements outlined under section 41 and any challenge that an employee may have would be with regard to substantive issues only.”

63. On that basis, the Respondent submitted that the petitioner termination was procedural and lawful and the Respondent has not violated any of the petitioner rights.

64. The Respondent also relied on the case of Kenya Power & Lighting Company Limited V Aggrey Wasike [2017] eKLR where the Court held that; -

“Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he “genuinely believed to exist...It bears repeating that the standard of proof an employer needs to be satisfied about an alleged act of criminality on the part of an employee is the lesser one of balance of probabilities.”

65. On the prayers sought, the Respondent submitted that they have proved sufficiently the reasons for terminating the services of the petitioner and that they followed due process, thus the prayers sought should not be granted. Particularly, on the prayer of reinstatement, it was submitted that the petitioner has not demonstrated any exceptional circumstances to warrant reinstatement. In this they relied on the case of Kenya Airways Limited V Aviation and Allied Workers Union Kenya & 3 others [2014] eKLR where the Court held that; -

“As I have said, in Kenya, reinstatement is one of the remedies provided for in Section 49(3) as read with Section 50 of the *Employment Act* and Section 12(3)(vii) of the Industrial Court Act that the court can grant. Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance the traditional common law position is that courts will not force parties in a personal relationship to continue in such relationship against the will of one of them. That will engender friction, which is not healthy for businesses, unless the employment relationship is capable of withstanding friction like where the employer is a large organization in which personal contact between the affected employee and the officer who took action against him will be minimal.”

66. They also cited the case of Alfred Nyungu Kimungui V Bomas of Kenya [2013] eKLR where the Court held that;-

“The Industrial Court should be cautious in exercising its jurisdiction, so as not to appear to take over and exercise managerial prerogatives at workplaces. Grant of interim orders that have the effect of limiting genuine exercise by management of its rights at the workplace, should be avoided. Termination of employment, and initiation of disciplinary processes at the workplace, are presumed to be management prerogatives.”



67. The Respondent further submitted that the consent orders of 7th December, 2020 was contested by their application dated 30th March, 2021 on the basis that the advocate who handled the matter M/ S Odhiambo and Opar Advocates had not been given instructions to act on behalf of the school, informing the decision by the Honourable Attorney General to step in and seek to set aside the said consent orders which its execution could amount to acting against the ministry of Education policy.
68. In conclusion, the Respondent submitted that they followed the law in terminating the services of the petitioner and that the Petitioner has failed to prove her case and thus is not entitled to the reliefs sought. The Respondent urged this Court to dismiss the petition with costs to them.
69. I have examined all evidence and submissions of the parties herein.
70. From the pleadings herein, the petitioner was employed as a bursar on 7/6/2012. There were attempts to transfer her services from bursar to Library Assistant on 1/10/2019 as per app SJK 2.
71. This letter was met with resistance and the petitioner even filed ELR Case No.1/2020 at Principal Magistrate's Court at Eldama Ravine.
72. Vide a consent dated 7th December 2020 the petitioner was declared reinstated unconditionally as school bursar with effect from 1/12/2020.
73. Disciplinary proceedings that had been instituted against him were struck out of her records.
74. Despite this consent, vide yet another letter dated 22/1/21 the 2nd respondents secretary wrote to the petitioner yet again informing her that she had been deployed to accounts office as school Accounts Clerk following a decision made by the Board of Management and a Government directive dated 24th November 2014 Ref. No. MOE CONT/G5.
75. This move was rejected by the petitioner vide her letter dated 1/3/21 APP SJK 10 where she intimated that she was willing to go back to court as per paragraph 6 of the court's direction of 7/12/2020.
76. On the same dated 1/3/2021, the petitioner was again served with a letter asking her to show cause why she should not be disciplined by the Board of Management for insubordination and absenteeism.
77. She responded to this letter denying allegations levelled against her vide her letter of 8/3/21.
78. On 17/3/21, she was suspended from duty. On 23/6/21 she was invited for a disciplinary process and vide a letter of 19/7/2, she was dismissed from duty with immediate effect.
79. I have set out the chronology of events herein to demonstrate the facts leading to the petitioner's dismissal.
80. The ruling of the subordinate court reinstating the petitioner to duty was never appealed against.
81. The respondents have however averred that the consent entered into between the parties in the lower court was contrary to the Ministry of Education policy dated 24th November 2014 that provides a three stream school should only employ two accounts clerks and not have provision for a bursar.
82. The respondents submitted about the fact that the petitioner has an active case pending before the lower court at Eldama Ravine where a decision has been made in the petitioner's favour. This, the petitioner has not denied and in fact the facts relied upon in this petition are similar to those in the lower court case. The respondents have even been punished therein for contempt of the court's orders directing reinstatement of the petitioner.



83. Despite these orders of the lower court the respondents have never appealed the decision but went on to force their own position transferring the petitioner to another position as an Accounts Clerk which in my view amounts to a constructive dismissal.
84. Despite the respondents averring that the petitioner was not entitled to an appointment as a bursar due to the size of the school, the respondents have not appealed the lower court's decision.
85. These facts notwithstanding, the petitioner herein has demonstrated that her rights as an employee have been trampled upon. She submits that her rights under Article 41, 47, 48, 50 & 236 have been contravened. Indeed the manner in which the respondents flouted the petitioner's right to fair labour practices, to a fair administrative action and right to be heard is clear. The respondents aver they treated the petitioner right but it is my finding that the respondents contravened the petitioner's rights under the constitution.
86. Despite there being a matter which had been pending in the lower court, the matter was determined and a judgment rendered the respondents recourse would have been an appeal. The issues of the petitioner's rights was also not an issue in the lower court and that in my view is not a bar to the petitioner pursuing her rights under this petition.
87. Having found as above, it is my decision that indeed the manner in which the respondent treated the petitioner was contrary to the law, it was illegal, unfair, unprocedural and unconstitutional.
88. I find the respondent's decision untenable and I order as follows:-
1. The order of the respondents altering the petitioner's employment, suspending and terminating her employment is hereby declared illegal, unconstitutional, null and void.
 2. An order of reinstatement or re-engagement of the petitioner with full pay and payment of all benefits from the date of the purported dismissal to date.
 3. In the alternative, I order a compensation equivalent to 12 months salary for the unfair termination/dismissal.
 4. Payment of general damages equivalent to kshs.500,000/= to the petitioner for breach of her constitutional rights.
 5. The respondents to pay costs of this petition plus interest at court rates with effect from the date of this judgment.

DATED AND DELIVERED IN OPEN COURT THIS 24TH DAY OF OCTOBER, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

