



REPUBLIC OF KENYA



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Ojwang' v African Nazarene University; Council of Legal Education & another (Interested Parties) (Petition 200 of 2022) [2023] KEELRC 2359 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2359 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 200 OF 2022
BOM MANANI, J
OCTOBER 5, 2023

**IN THE MATTER OF ARTICLES 10(2) (B), 22(1), 23, 47(1),
50(1), 162(2) (B), 259(1) & 260 OF THE CONSTITUTION OF
KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS
OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 25, 27(1),
(2) & (5), 33(1) (C), 35, 41 OF THE CONSTITUTION OF
KENYA**

AND

**IN THE MATTER OF THE EMPLOYMENT AND LABOUR
RELATIONS COURT ACT NO 20 OF 2011
AND**

**IN THE MATTER OF THE UNIVERSITIES ACT NO 42 OF 2012
AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA
(PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS)
PRACTICE AND PROCEDURE RULES UNDER RULES, 2013**

BETWEEN

BETWEEN

DUNCAN OBURU OJWANG' PETITIONER

AND



AFRICAN NAZARENE UNIVERSITY RESPONDENT

AND

COUNCIL OF LEGAL EDUCATION INTERESTED PARTY

COMMISSION FOR UNIVERSITY EDUCATION INTERESTED PARTY

RULING

Background

1. At the time of filing this petition, the petitioner and respondent had an employment relation. In addition to several other administrative functions, the petitioner was also a senior lecturer at the respondent's School of Law.
2. The petitioner avers that despite attaining the requisite qualifications for appointment to the position of associate professor, the respondent has deliberately frustrated his progression to this position. It is the petitioner's case that the respondent called for applications for faculty progression following which he applied for the position of associate professor. The petitioner states that he was shortlisted for interview and appeared before a panel that had been set up for this purpose.
3. It is the petitioner's case that when he appeared before the panel, it became apparent that the said panel was improperly constituted. The panel lacked external reviewer's contrary to the applicable faculty progression policy. Similarly, the panel lacked a reviewer with specialization in the field of law and who was either at the same level with or higher position as compared to the petitioner.
4. The petitioner contends that during its deliberations, the panel indicated that it lacked the requisite competencies to review the petitioner on certain critical indicators prompting an adjournment of the progression review process. According to the petitioner, despite the panel adjourning as aforesaid, the Vice Chancellor of the respondent irregularly converted the session into an annual performance review session for the petitioner. This was despite the petitioner not having been forewarned that he will be subjected to this latter review.
5. The petitioner contends that during the irregular performance review session, the panel questioned him over various matters that had nothing to do with the business of the day. According to the petitioner, this latter exercise which was encouraged by the respondent's Vice Chancellor, was motivated by ulterior intent against him. It is the petitioner's contention that the process subjected him to unnecessary humiliation as he was put in a position which forced him to react to inquiries over issues that he had not been given an opportunity to reflect on.
6. The petitioner argues that due to his administrative roles at the respondent institution, he had crossed paths with the respondent's senior management and in particular, the institution's Vice Chancellor. The petitioner believes that this disagreement played a pivotal role in his tribulations.
7. It is the petitioner's case that notwithstanding that the faculty progression session had been adjourned, the panel used the data it collected during the informal and demeaning session to deny him the opportunity to progress to the position of Associate Professor. Further, the petitioner contends that despite the panel having adjourned its session for want of the necessary competencies, he was surprised to later learn that some of his peers who had undergone a similar process were promoted whilst his case was ignored. The petitioner contends that this treatment amounted to discrimination against him. As such, it is the petitioner's case that he was denied equal protection of law.



8. The petitioner argues that the ill treatment he was subjected to by the respondent was motivated by the fact that the respondent's officials were uncomfortable with the position that he had taken on a number of matters. In the petitioner's view, the respondent's reaction to differences in opinion between him and the respondent's management on various matters violated his freedom of expression and undermined his academic freedom.
9. The petitioner argues that his efforts to access information explaining his peers' progression and his stagnation have been met with silence from the respondent's management. Despite the petitioner's call for this information, the respondent has declined to divulge it. In the petitioner's view, the respondent's conduct has violated his right to information and the right to fair administrative action.
10. Overall, the petitioner argues that the respondent's treatment of him has been such as to violate his constitutional rights to: protection from discriminatory treatment; equal protection of the law; dignity; freedom of expression; information; fair labour practice; and fair administrative action. The petitioner has set out the various constitutional provisions that he contends that the respondent has violated.
11. Suffice it to state at this juncture that the respondent has filed a detailed response to the petition. In the response, the respondent contests the position expressed by the petitioner on the issues under consideration. Importantly, the respondent holds the view that the petitioner's grievance, in so far as it seeks to challenge the employer's managerial prerogative in relation to staff progression, is unmerited. The respondent contends that the petition does not raise constitutional questions for determination by the court.

Preliminary Objection

12. The respondent has raised preliminary points of law regarding the competence of the petition. The objections are as follows: -
 - a. The petition has not raised constitutional questions for determination by the court sitting as a constitutional court.
 - b. The petition does not raise valid grievances for violation of constitutional rights.
 - c. The matters that are raised by the petitioner fall in the realm of an ordinary employment dispute that relates to implementation of the respondent's faculty progression policy whose resolution does not warrant the court to sit as a constitutional court.
 - d. Since the petitioner has allegedly left the respondent's employment, the petition has been overtaken by events.
 - e. The petition is an abuse of the court process.
13. The above objections in effect only raise two critical issues for determination: -
 - a. Whether the issues raised by the petitioner justify the filing of these proceedings through a constitutional petition as opposed to an ordinary civil action.
 - b. Whether the petition has been overtaken by events.

Analysis

14. It is correct as observed by the respondent that not all disputes that are filed in court ought to be disguised as constitutional petitions even when they are, in reality, ordinary disputes. Courts should



entertain constitutional petitions only in cases that clearly raise constitutional questions for the court's determination.

15. As has been observed severally, whether a dispute raises a constitutional question usually turns on whether the pleadings originating the action force the court to consider and interpret a constitutional provision in order to determine the matter. In *Dhow House Limited v Kenya Power and Lighting Company* (constitutional petition E058 of 2021) [2022] KEHC 11840 (KLR), the court said this of a constitutional question:-

“...a constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute. When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider constitutional rights or values.”

16. As pointed out in the above decision, at the stage at which the court is called upon to determine whether a matter should have been filed as a constitutional petition or as an ordinary claim, all that the court is expected to do is to scan through the pleadings to determine whether there is a matter that will require it to interpret and apply the *Constitution*. At this stage, the court is not expected to and cannot conduct an inquiry into the strengths and merits of the case.
17. Importantly, whilst navigating the terrain of determining whether the pleadings raise a constitutional question for resolution, the court must also consider the twin question whether the petition, as framed, provides sufficient particulars of the alleged constitutional violations. This requirement is anchored on the renowned decision in *Anarita Karimi Njeru v Republic* [1979] eKLR.
18. I have considered the dispute before me in the context of the foregoing principles. As mentioned earlier, the petitioner's complaint is that because of the differential treatment that he was allegedly subjected to by the respondent, he was deprived of the chance to rise to the position of Associate Professor. The petitioner's complaint is not merely that he was denied the opportunity to progress to the position of Associate Professor. Rather, the complaint is about the alleged discriminatory treatment by the respondent that deprived him of this opportunity.
19. In order to determine whether the petitioner was discriminated against, the court has to apply the anti-discrimination provisions in the *Constitution* to the facts that the petitioner will present. This will involve application and interpretation of the *Constitution*.
20. The second issue that the petitioner raises is whether the respondent's alleged discriminatory acts in effect deprived the petitioner of equal protection of the law contrary to article 27 of the *Constitution*. In order to answer this question, the court will once again have to weigh the petitioner's assertions against the provisions of article 27 of the *Constitution*. Inevitably, this brings into play interpretation and application of the *Constitution*.
21. Apart from the foregoing, the petitioner has raised a plethora of other grievances. For instance, he avers that the respondent withheld critical information on the faculty progression evaluation process thus depriving him of his constitutional right to information. Further, the petitioner contends that he was treated with indignity when he was mishandled during the impugned evaluation process in contravention of his constitutional right under article 28 of the *Constitution*. In addition, the Petitioner argues that he was treated differentially because of his difference of opinion with the respondent's management on a number of matters in violation of his right to freedom of expression.



22. All these grievances allege violations of constitutional rights that are attributable to the respondent's actions. In order to determine the validity of the assertions, the court has to apply the constitutional provisions that have allegedly been infringed to the facts that the petitioner will present before court. Inevitably, this will result in the interpretation and application of the Constitution to the issues under consideration.
23. Having regard to the foregoing and the petition as framed, I hold the view that the case raises constitutional questions for determination by the court. Whether the petition will ultimately succeed on its merits is an entirely different matter which the court has no means of determining at this stage.
24. I appreciate the argument by the respondent that the Employment Act and the Fair Administrative Action Act provide mechanisms for addressing some of the issues that are raised by the petitioner such as whether his rights to fair labour practice and fair administrative action have been violated. However, this statutory regime may not provide a suitable platform for adjudicating on other matters that the court is called upon to address. These include whether the petitioner's rights to equal protection of law, freedom of expression and information have been violated as a result of the respondent's actions. These latter set of issues can only be fairly addressed through a constitutional petition.
25. The other matter that I have to consider is whether the petition has provided sufficient particulars of the alleged constitutional violations. I have considered the petition and i am satisfied that it meets the guidelines set under the case of Anarita Karimi Njeru v Republic [1979] eKLR. The petitioner has set out the constitutional provisions that were allegedly infringed. He has set out the constitutional rights that he alleges were infringed. Further, the petitioner has provided the factual basis for his allegations. What the court is required to do is to test the veracity of the factual basis.
26. As was indicated in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR, the requirement that a constitutional petition ought to be precise must not be mistaken for a demand for exactitudeness of the petition. It is sufficient if the petition provides, with a reasonable measure of clarity, that of which the petitioner complains. The court expressed this view as follows: -
- “We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”
27. The other matter that the respondent raises relates to whether the petition has been overtaken by events following the alleged separation of the parties. The question of separation of the parties and whether it has obliterated the substratum of the petition is an issue that will require a full hearing. In any event, the validity of some of the claims in the petition appears not to be tied to the continued existence of the employment relation between the parties.
28. The respondent has also raised the question whether some of the prayers in the petition can be granted by the court. I should perhaps point out that this matter was raised in the respondent's submissions without having been explicitly flagged in the grounds that informed the preliminary objection.



29. Be that as it may, the issue that the respondent raises in respect of whether the reliefs that are sought by the petitioner can be granted is a matter that can only be determined once the court has heard the petition. It is true that employers enjoy managerial prerogative to make decisions at the workplace and the court should not whimsically interfere with the exercise of this mandate. However, courts are entitled to inquire into whether the employer has exercised this prerogative within the law, the internal regulations at the workplace and the agreement between the parties.

Determination

30. The upshot is that the preliminary objection lacks merit.

31. Accordingly, the objection fails.

32. Costs of the failed preliminary objection are granted to the petitioner.

DATED, SIGNED AND DELIVERED ON THE 5TH DAY OF OCTOBER, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... **for the Applicant**

..... **for the Respondent**

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

