



REPUBLIC OF KENYA



**Ali v Director General, National Youth Service & another (Petition  
E125 of 2022) [2023] KEELRC 2928 (KLR) (16 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2928 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E125 OF 2022  
NZIOKI WA MAKAU, J  
NOVEMBER 16, 2023**

**BETWEEN**

**RASHID DIKA YUSSUF ALI ..... PETITIONER**

**AND**

**DIRECTOR GENERAL, NATIONAL YOUTH SERVICE ..... 1<sup>ST</sup> RESPONDENT**

**MINISTRY OF PUBLIC SERVICE YOUTH & GENDER**

**AFFAIRS ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. In the Petition dated 24<sup>th</sup> June 2022, the Petitioner sought the following Orders against the Respondent:
  - a. An order to quash the decision made by the 1<sup>st</sup> Respondent on a letter dated 16<sup>th</sup> June 2021 confirming the removal and 23<sup>rd</sup> October 2017 which removed the petitioner from service.
  - b. A declaration that the decision on the letter dated 16<sup>th</sup> June 2021 was found on unsubstantiated evidence and was made unlawfully after a very long duration.
  - c. An order reinstating into service the petitioner without losing his rank, to inspector rank to benefits, to the rank of inspector, unpaid salary and allowances and on the same terms as before.
  - d. A declaration that the Petitioner's Constitution rights to a credible and a fair hearing has been violated and consequently issue an order quashing the decision made by the Respondents and to award damages to the Petitioner for violation of his inalienable rights.
  - e. An order directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly and severally to pay the petitioner 12 months' gross salary for unlawful termination.
  - f. An order for issuance of an unconditional certificate of service.



- g. An order for costs of the petition.
- h. Such other orders as this Honourable Court may deem fit to grant.
2. The Petitioner's case was that he was a private employee of the 1<sup>st</sup> Respondent, personal number 2010022800 and that he earned a gross salary of Kshs. 17,880/-. He averred that on or about 23<sup>rd</sup> October 2017, the 1<sup>st</sup> Respondent dismissed him from employment without any proof and based on unsubstantiated hearsay and allegations of purported desertion of duty and that it backdated the dismissal to be with effect from 4<sup>th</sup> April 2016. Further, the 1<sup>st</sup> Respondent did not accord him a hearing or furnish him with clear and unequivocal grounds for the dismissal that was done before an interdiction and or show cause. He argued that the 1<sup>st</sup> Respondent failed to take fair regard and determination to his explanation and the circumstances under which he was granted leave to bury his son by the officer in-charge, Mr. Mulei. In addition, that the Respondent's decision to remove him from service did not consider the recommendation of the Officer in charge, Mechanical & Transport Branch (MTB) vide the Internal Memo dated 21<sup>st</sup> September 2016 and the Memo dated 31<sup>st</sup> July 2017 on the contradicting issues as read with the Memo dated 8<sup>th</sup> May 2017 from the Director, Human Resource. The Petitioner further averred that on 12<sup>th</sup> January 2018, he appealed against the decision of the 1<sup>st</sup> Respondent to terminate his employment but the Respondents upheld the termination through a letter dated 16<sup>th</sup> June 2021, four (4) years after the said appeal was lodged. He thus sought to have the 1<sup>st</sup> Respondent's decision arising from the letters dated 16<sup>th</sup> June 2021 and 23<sup>rd</sup> October 2017 quashed for contravening the Public Service Act, Rules and Regulations thereof. That the 1<sup>st</sup> Respondent acted in excess of powers and disregarded the principles of the right to fair labour practice in making a substantive decision to withhold his full salary from April 2016. It was the Petitioner's averment that he had a legitimate expectation to a fair investigation, fair hearing and fair administrative treatment as provided for under Articles 47 and 50 of *the Constitution* of Kenya.
3. In particularizing the constitutional violations, he pointed out that the Respondent's failure to consider his response, ignoring his right to be heard on his response and appeal and to be accompanied by a colleague of his choice, sitting on his appeal for over four (4) years, and the unilateral withholding of his salary without notice or proper reason constituted procedural unfairness. That the action or inaction of the Respondent was vindictive, discriminatory, unconstitutional and in disregard of the values and principles set out in Articles 10, 27, 45, 50 and 232 of *the Constitution* of Kenya.

### **Respondents' Case**

4. The 1<sup>st</sup> Respondent filed a Replying Affidavit sworn on 6<sup>th</sup> July 2023 by the Human Resource Management Officer at the National Youth Service, Ms. Jessica Mwangi, on behalf of both Respondents herein. Ms. Mwangi averred that the Petitioner was appointed into the NYS (hereinafter "the Service") through a letter dated 25<sup>th</sup> March 2010 and was dismissed on 4<sup>th</sup> April 2016. That in a letter dated 22<sup>nd</sup> September 2011, the Petitioner was confirmed as an employee of the Service on permanent and pensionable terms. That the Petitioner was later redeployed from his posting station at the MTB to Lamu County Inter Agency Project, the Youth Empowerment Project vide a letter dated 30<sup>th</sup> October 2015 and a radio message dated 19<sup>th</sup> February 2016. According to the Respondents, the Petitioner, while attached to the Youth Empowerment Programme Kongowea Market that falls under the Commanding Officer NYS Technical College Mombasa, was reported absent from duty through radio messages dated 12<sup>th</sup> and 13<sup>th</sup> April 2016 and a letter dated 22<sup>nd</sup> July 2016. That the Petitioner was also notified of his desertion of duty in a letter dated 22<sup>nd</sup> April 2016 and issued with a Show Cause Letter dated 10<sup>th</sup> October 2016 and a reminder on the same dated 17<sup>th</sup> November 2016. That the Commanding Officer NYSTC Mombasa then wrote the 1<sup>st</sup> Respondent the letter dated 9<sup>th</sup> December



2016 recommending disciplinary action to be taken against the Petitioner for his desertion of duty and on account of his unknown whereabouts.

5. It was Ms. Mwangi's averment that the Petitioner's disciplinary case was deliberated upon by the Departmental Human Resource Management Advisory Committee (DHRMAC) in a meeting held on 3<sup>rd</sup> March 2017. That however in view of the fact that the Petitioner's desertion of duty was reported by a station different from his posting station and necessitating clarification over the same, the said Committee deferred making any recommendations. That the Committee thereafter held a meeting on 17<sup>th</sup> August 2017 and upon deliberations, recommended that the Petitioner be dismissed from Service with effect from 4<sup>th</sup> April 2016 for deserting duty for 185 days. Ms. Mwangi averred that whereas the Petitioner had in his appeal against the dismissal cited compassionate grounds as his reason for absenting himself from duty, the Service was not aware of his personal tragedy. That there were no records either via a personal notification, leave application or a letter from the Petitioner's supervisor stating that he was given time off from his duties. Ms. Mwangi further averred that the Petitioner was given a hearing for his appeal as directed by the Public Service Commission (PSC) in its letter dated 1<sup>st</sup> November 2018. That by an appointed Committee in a meeting held on 10<sup>th</sup> July 2019, the Petitioner was thus heard on his appeal and he defended himself against the alleged grounds of gross misconduct levelled against him. That during the said hearing, the Petitioner presented a birth notification and a burial permit for his still-born child, both of which had previously not been presented in his representations. That together with a letter from the chief, the said documents were all issued to the Petitioner on 22<sup>nd</sup> January 2018, which was over one (1) year and 10 months after the alleged demise of his son on or around end of February and/or early March 2016. She contended that the said three documents were thus allegedly generated for purposes of the Petitioner's appeal against his dismissal and that they did not have a nexus with the charge of desertion that was with effect from 4<sup>th</sup> April 2016 to 7<sup>th</sup> October 2016.
6. That later on, the Petitioner's case was presented to the DHRMAC meeting held on 1<sup>st</sup> October 2019 but was deferred awaiting representation from the then Commanding Officer NYSTC Mombasa, who had reported the Petitioner's absence from duty. That upon receiving the said representations, a meeting of the DHRMAC held on 3<sup>rd</sup> March 2020 found there were no new material facts raised during the Petitioner's hearing that would alter the earlier decision to dismiss him from the Service. That in a meeting of the NYS Council held on 30<sup>th</sup> September 2020, the decision to dismiss the Petitioner was thus upheld and the Petitioner was notified in writing through the letter of 16<sup>th</sup> June 2021 that his appeal had been disallowed. It was the Respondents' position that the Petitioner had previously been warned on acts of misconduct through a letter dated 21<sup>st</sup> May 2012 and a Memo dated 10<sup>th</sup> December 2015, after having absented himself from duty and boycotted work due to delayed payment of allowances respectively. Ms. Mwangi argued that the Petitioner had produced in evidence (para 7 of Petition) and relied upon internal memos that were never addressed or copied to him and that since the said memos were illegally obtained contrary to Article 50(4) of *the Constitution*, they should be expunged from record. Without prejudice to the foregoing, she averred that the comments made in the Memo dated 21<sup>st</sup> September 2016 were not binding on the authorised officer or at all and that neither the officer in-charge nor the commanding officer had delegated powers to punish officers working at the Service. She further argued that the Petitioner had in fact, in his appeal, admitted to the charge/ground of desertion as follows:

“...this incident is the only time I have had issues as an officer...instead of dismissing me from the service I be served with a warning against repeat of offence in future.”



7. The Respondents assert that further, the Petitioner also undertook to follow all the necessary protocols in the service in future if reinstated. According to the Respondents, that undertaking and the plea for lesser punishment meant that the Petitioner was guilty of the charge against him and justified the decision to dismiss him. It was the Respondents' averment that the Petition herein lacked merit, was frivolous, vexatious and amounted to an abuse of the court process and that it ought to be dismissed with costs to the Respondents.
8. The Petition was disposed of by way of written submissions.

### **Petitioner's Submissions**

9. The Petitioner submitted that the Respondents clearly failed to adhere to the laid out procedural processes, timelines required and the constitutional dictates to a fair hearing. That the Respondents had neither tendered any evidence that he was accorded a fair hearing nor given any justification as to why the Memo dated 21<sup>st</sup> September 2016 from the officer in-charge of MTB recommending forfeiture of salary and for a warning to be served upon the Petitioner was ignored, as seen in comment number 4 in the said Memo. That in fact, the Director, Human Resource in his Memorandum of 8<sup>th</sup> May 2017 to the officer in-charge, MTB stated that the said Branch should have informed the HR Office if there was any desertion and further admitted that the case had subjected the Petitioner to unnecessary torture. It was the Petitioner's submission that he ought to therefore be reinstated and or in the alternative, be paid 12 months' salary for unlawful termination and Kshs. Million for the unnecessary torture and violations he went through. He relied on the case of *Ongaro v Judicial Service Commission & another* (Petition E007 of 2021) 2022 KEELRC 1175 (KLR) (14 July 2022) (Judgment) in which the Court found that in determining whether or not the Respondents violated the provisions of *the Constitution* upon which the petition was premised, it had to make a finding whether or not they met both the procedural and the substantive justification tests prior to dismissing the Petitioner, as under Sections 41, 43, 45 and 46 of the *Employment Act*. The Petitioner submitted that in the instant case, the Respondents did not comply with the aforementioned tests and the law and that judgement should be entered in his favour. Further, that the dispute herein could not be decided on other grounds without involving *the Constitution* on the infringement of basic rights and fair labour practices.

### **Respondents' Submissions**

10. The Respondents submitted that the issues for determination were as follows:
  - a. Whether the Petitioner has made a case for breach of his constitutional rights;
  - b. Whether due process/procedure was followed;
  - c. Whether the reason for the dismissal was valid; and
  - d. Whether the Petitioner is entitled to the prayers sought.
11. It was the Respondents' submission that the Petition does not meet the threshold espoused in the cases of *Mumo Matemu v Trusted Society of Human Rights and Anarita Karimi v Republic*, which set the threshold to be met in a petition alleging constitutional violations. That the Courts opined that such a Petition should define the dispute to be decided and plead with particularity and reasonable precision on the provisions breached and the nature or manner of the breach alleged or complained of. The Respondent's position was that the present Petition and the Petitioner's submissions were a mere reproduction of the constitutional provisions allegedly violated without any evidence to prove the alleged violations and that no set of particulars had been specifically disclosed. That the allegations of breach lack basis and are contrary to Regulation 10 of the Employment and Labour Relations Court



(Procedure) Rules 2016 and Regulation 10(2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of *the Constitution*) Practice and Procedure Rules 2013. The Respondents cited Petition No. 17 of 2016 - Brian Makori v Kenya Examination Council [2017] eKLR in which Okwany J. cited with approval the case of Siewchand Ramanoop v The AG of Trinidad & Tobago, [2005] UKPC 15 where it was held that when exercising this constitutional jurisdiction, the court is concerned to uphold or vindicate the constitutional right contravened and that whilst a declaration by the court will articulate the fact of the violation, in most cases, more will be required than words. They also cited the case of Kiambu County Tenants Welfare Association v Attorney General & another [2017] eKLR in which Mativo J. (as he then was) further observed that the burden of establishing all the allegations rests on the Petitioner who is under an obligation to discharge the burden of proof but that thereat, the petitioner had failed to discharge the burden of proof to the required standard. Further, that in East African Portland Cement Company Limited v Attorney General & another [2013] eKLR, Rika J. relevantly and aptly captured thus:

“Courts must guard against the distortion, or manipulation of the constitutional rights regime. Characterizing everyday dispute as a constitutional violation, trivializes *the Constitution*, transforming it from a blueprint of fundamental freedoms and rights, into a document for litigating everyday disputes. *The Constitution*'s moral force is diminished, when day to day affronts, raise potential constitutional claims. If every legal question is constitutionalized, the overall effect is the dilution of constitutional protections. Not all actions that impinge on constitutional values call for a constitutional answer...”

12. It was the Respondents' submission that from the foregoing authorities, the Petition herein lacks merit and ought to be dismissed with costs. That it was the duty of the Petitioner to clearly point out the violations of *the Constitution* or his rights but he had failed to do so. As to whether due process was followed, the Respondents submitted that interestingly, the Petitioner made no reference to the fact that he was heard after the PSC directed the Respondent to hear his appeal. Furthermore, since the Petitioner did not file a further affidavit to challenge the Respondents' evidence, their case thus remains not rebutted or controverted. They cited the Nigerian Supreme Court's decision in BA Imonikhe v Unity Bank PLC S.C 68 of 2001 that the appellant was given a fair hearing since he answered the queries of misconduct asked by the employer before he was dismissed. They further relied on the holding of the Court of Appeal in Kenya Ports Authority v Fadhil Juma Kisuwa [2017] eKLR that fair hearing does not necessarily mean oral hearing and an exchange of correspondence will also suffice. It was the Respondents' submission that the Petitioner herein was accorded a fair hearing and that this Court ought to not interfere with the sanctions imposed to dismiss the Petitioner as his conduct was incompatible with the terms and conditions of employment with the Respondent. Submitting on the validity of the reason for dismissal, the Respondents pointed out that the Petitioner had attempted to deny the charge of desertion by claiming that after attending the Slum Intervention at Kongowea Market in Mombasa on 18<sup>th</sup> February 2016, he was given an allowance of 10 days to go back to Nairobi for further instructions. That moreover during the said period, he suffered a tragedy in his family when his wife delivered a still-born baby after which Mr. Mulei gave him compassionate leave of seven (7) days. The Respondents argued that even so, the 10 days ended on or around 29<sup>th</sup> February 2016 as it was a leap year while the compassionate leave of 7 days to mourn was with effect from 1<sup>st</sup> to 7<sup>th</sup> March 2016. In addition to their averment that the birth notification, burial permit and letter from the chief did not have a nexus with the charge of desertion that was effected from 4<sup>th</sup> April 2016 to 7<sup>th</sup> October 2016, the Respondents submitted that the Petitioner had not tendered any negligible explanation as to his whereabouts during the period he was charged with desertion.



13. Regarding the admissions it asserted the Petitioner made in his appeal against the dismissal, the Respondent cited the case of *Martin Waweru Nguru v Attorney General* [2019] eKLR in which the Court held that the plaintiff's apology meant he had admitted he was guilty of the charge of desertion made against him. That in the case of *Teachers Service Commission v Sarah Nyanchama Ratemo* [2014] eKLR - Civil Appeal No. 14 of 2014, Kariuki, Sichale and Kantai JJA, held that,
- “The charge of desertion was proved and if there was any doubt, it would be erased by the admission of the respondent during the disciplinary proceedings on 2<sup>nd</sup> July, 2010 when the respondent confirmed that she went away from duty without permission for study leave.”
14. It was the Respondents' submission that in the instant case, the Petitioner admitted to the charge of desertion from duty without permission for over 185 days and requested for lenience or warning instead of dismissal as it was his first offence. That the reason for his dismissal was therefore valid and the Petitioner had failed to exculpate himself. The Respondents submitted that with regard to the prayer for reinstatement, which is not of right but discretionary, the Petitioner had not moved the court that his case meets the factors under section 49(4) of the *Employment Act*. That in fact, the Petitioner had not submitted on the said prayer at all. Nevertheless, they argued that reinstatement can only be issued where the suit is determined within 3 years of dismissal and by arithmetic, it was close to 6 years since the Petitioner's dismissal on 17<sup>th</sup> October 2017. It was their submission that the Petitioner did not deserve to be reinstated because there was no constitutional provision permitting reinstatement. They relied on the analysis of the Court, on the issue of reinstatement as a remedy, in the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR. In conclusion, it was the Respondents' submission that the Petition was ripe for dismissal and they urged the Court should dismiss the same with costs.
15. The Petitioner was dismissed from service after desertion that was a total of 185 days. He was taken through hearings and he even appealed to the Public Service Commission where his appeal was heard and his dismissal from service upheld. He was heard during his appeal at PSC and one of the telling aspects of his appeal was that he accepted his error and sought forgiveness. He undertook not to repeat the mistake if allowed back. He previously had absented himself from the workplace without leave and the refusal by PSC to reverse the dismissal was on account of his previous conduct. He therefore was properly dismissed from service since there was no evidence of malice in the actions of his superiors or even the Public Service Commission. As such, the Petition is unmerited and is accordingly dismissed albeit with no order as to costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF NOVEMBER 2023**

**NZIOKI WA MAKAU**

**JUDGE**

