



**Owenga v Office of the Director of Public Prosecutions Advisory Board
The Office of the Director of Public Prosecutions Advisory Board (Petition
E028 of 2023) [2023] KEELRC 3348 (KLR) (8 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3348 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E028 OF 2023

SC RUTTO, J

DECEMBER 8, 2023

**IN THE MATTER OF RULES 3(4), 4, 11, 13, 19 AND 23 OF THE CONSTITUTION
OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)**

PRACTICE AND PROCEDURE RULES, 2013

AND

**IN THE MATTER OF GUIDELINES ON THE
BOND FOR TRAINING PUBLIC SERVANTS, 2018**

AND

**IN THE MATTER OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS
HUMAN RESOURCE MANUAL, 2013**

BETWEEN

MONICA AKOTH OWENGA PETITIONER

AND

**THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ADVISORY
BOARD THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS
ADVISORY BOARD RESPONDENT**

JUDGMENT

1. The Petitioner is a former employee of the Respondent, having been employed as a Senior Prosecution Counsel sometimes in 2012.
2. The Respondent is an Advisory Board of the Office of the Director of Public Prosecutions established under Section 16 of the [Office of the Director of Public Prosecutions Act](#).



3. The Petitioner moved this Court through a Petition dated 9th February 2023, seeking the following orders:
 - a. A declaration that the Respondent's Action to dismiss the Petitioner was unprocedural unfair and unreasonable being without evidence and investigation and violated the plaintiffs(sic) due process protection(sic) under the *Constitution*, the law and fundamental rights as(sic) hence null and void ab initio with the net effect that the Petitioner is reinstated to her rank without loss of salary and benefits.
 - b. Damages for violation of the Petitioner's fundamental rights under Articles 27(1), 28, 41 and 47.
 - c. Costs of the suit and interest.
4. The Respondent did not file a response to the Petition. As such, the Petition was not opposed.

Petitioner's case

5. The Petition is supported by the Petitioner's Affidavit sworn on 9th February 2023, through which she avers that she did not have any disciplinary record during her period of employment and that she was promoted on merit, professionalism and hard work.
6. It is the Petitioner's case that on 8th March 2020, she visited Burkes stores in Rosewell New Mexico, in the USA to purchase a suitcase for the purpose of weighing on her travel back home. This was after attending a prosecutorial conference in which she had been chosen to represent the Office of the Director of Public Prosecutions.
7. She further avers that in the course of the said purchase, she unconsciously and unintentionally failed to pay for all the selected items. She attributes this to a mistake on the part of the teller who was scanning the items. She further denies shoplifting and states that she only paid for what was prompted by the teller. According to the Petitioner, she had enough money in her debit and credit cards that she had carried.
8. The Petitioner further states that she was summarily dealt with and her explanation was rejected. There was no one to help her.
9. She further avers that the security made it a bigger issue and called her host. In a sequence of events, she was told to leave the conference and leave for home. She termed this unfair and unreasonable.
10. She further avers that when she returned to Kenya, she was summarily suspended without any hearing or evidence. That she received a notice to Show Cause three months later on 23rd June 2020 and responded to the same on 30th June 2020.
11. She further states that without notice to counsel or attendance of a colleague or investigation or evidence, she was summoned for a hearing in which she adopted her statement and explained to the Respondent's panel what had happened.
12. The Petitioner avers that without any extrinsic, independent, or investigation evidence, the Respondent dismissed her. In her view, this was unfair, unlawful, and unprocedural.
13. She lodged her appeal demonstrating that this was an isolated Case and that she had never had a demonstrated record of integrity, respect and professionalism. She prayed for leniency but was summarily dismissed.



14. She further states that she had dedicated her service to the public and such abrupt and unprocedural termination affected not only her dignity and reputation but had a toll on her young family and children.
15. According to the Petitioner, the Respondent's actions were in breach of the procedural rules, constituted unfair labour practice under Article 41, and also unfair, and unlawful Administrative Action under Article 47.
16. In the Petitioner's view, it was unreasonable not to consider her representation yet there is no other evidence. She contends that the CCTV evidence would be clearer.
17. She further states that being a visitor in a foreign and new in such an environment, she believes there was a cultural barrier and bias that borders on racism, which was also picked up by the Respondent.
18. She has termed the Respondent's action as unconstitutional and an affront to her fundamental rights and freedoms and a right to a fair hearing. That the Respondent's panel was the accuser, the investigator and the judge all rolled into one offending the principle of Natural Justice enshrined under Articles 50(1), 47(1) of the *Constitution*.

Petitioner's Submissions

19. The Petition was canvassed through written submissions. The Petitioner submitted that the proceedings were founded on hearsay. In this regard, it was the Petitioner's submission that as per Sections 107 to 109 of the *Evidence Act*, the burden was on the Respondent to prove that what she had said was not true. In support of this position, the Petitioner placed reliance on the case of *CMC Aviation Ltd vs Cruisair Ltd (No. 1)* (1978) KLR 103.
20. It was further submitted by the Petitioner that being a public officer, her terms and conditions were protected under Article 236 (b) of the *Constitution* and she could not be dismissed without due process.
21. The Petitioner further posited that the Petition is unassailed and that her constitutional and fundamental rights as enshrined in Articles 236(b), 41,47, 28 and 27 of the *Constitution* have been established on a balance of probabilities.

Analysis and Determination

22. Arising from the Petition and the submissions on record, the Court singles out the following issues for determination:
 - a. Whether the Petitioner's Constitutional rights were violated by the Respondent; and
 - b. Whether the Petitioner is entitled to the reliefs sought.

Constitutional violation?

23. The Petitioner has cited the Respondent for violation of her constitutional rights and to this end, has specifically flagged Articles 41,47, 50 and 236(b) of the *Constitution* as having been violated.
24. The Petitioner has argued that the Respondent's actions were in breach of the procedural rules and constituted unfair labour practices under Article 41 and unlawful administrative action under Article 47 of the *Constitution*. She further contends that it was unreasonable for the Respondent not to consider her representation or any other evidence.



25. Article 41 of the *Constitution* guarantees every person the right to fair labour practices while Article 47 guarantees every person the right to fair administrative action. In this regard, Article 47 provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In addition, it provides that where an administrative action is likely to adversely affect a person, such a person is entitled to be given written reasons for the action.
26. Article 50 of the *Constitution* guarantees the right to a fair hearing and provides that every person has the right to have any dispute that can be resolved by the application of the law, to be decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
27. Article 236 (b) provides that: -
- (236) A public officer shall not be—
- (a)
- (b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.
28. In the instant case, the Petitioner has admitted that she received a notice to show cause dated 23rd June 2020 and responded to the same. Indeed, she exhibited two responses dated 16th March 2020 and 30th June 2020.
29. In addition, the Petitioner admitted that she was summoned by the Respondent to a disciplinary hearing. With respect to this, she exhibited a copy of an invitation letter dated 23rd June 2020 which is partly couched as follows:
- “This is to inform you to appear before the ODPP Advisory Board Sub Committee in a meeting scheduled for 30th June 2020 at 10:00 am in the Ndovu Boardroom, ODPP Building, Ragati Road and make your representations regarding the misconduct. Please note that you are entitled to be accompanied by any person of your choice to be present in the meeting.”
30. What manifests from the foregoing is that the Petitioner was notified of the reasons for which the Respondent was considering disciplinary action against her and was allowed to respond to the same. As stated herein, she submitted two responses. Further, she was invited to a disciplinary hearing and was notified of her right to be accompanied by any person of her choice.
31. Therefore, it is apparent that the Petitioner was given an opportunity to be heard in writing and in person. It is also notable that she has not raised any issue regarding the process she was subjected to, for instance, the reasonableness of the timeframe she was given to respond to the notice to show cause or appear for the disciplinary hearing. To that extent, I am unable to fault the Respondent with regards to the process it applied in terminating the Petitioner.
32. As I see it, the Petitioner’s main contention is that she was dismissed without extrinsic and independent evidence. According to the Petitioner, there was no other evidence and her representation was not considered. Revisiting the Petitioner’s response dated 30th June 2020, it is noteworthy that she stated as follows:
- “While in the shopping, I accidentally put some items in my handbag and the same were thus not processed for payment at the counter as required”.



33. Essentially, this was an admission on the Petitioner’s part that she had collected items from the store while shopping and failed to pay for the same. This is further bearing in mind the fact that the Petitioner was accused of shoplifting and according to her letter of dismissal, the offence she had committed was criminal in nature and thus amounted to gross misconduct.
34. What’s more, the standard of proof in cases involving termination of employment is on a balance of probabilities and not beyond reasonable doubt. Therefore, all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee’s services. Such was the determination in the case of *Kenya Revenue Authority vs Reuwel Waitbaka Gitabi & 2 others* [2019] eKLR. In that same decision, the Court held that:
- “We have carefully re-evaluated the evidence on record on this issue and we think, with respect, that the trial court applied a skewed standard of proof, and, certainly, not the one provided for under section 43 (1) of the Act. It is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required.”
35. Therefore, in this case, the employer was not required to prove the allegations against the Petitioner beyond reasonable doubt, for instance through the CCTV footage from the store in question.
36. In total sum, it is this Court’s finding that the Petitioner has not demonstrated the manner in which the Respondent violated her constitutional rights as alleged.
37. Before I pen off on this issue, I find it imperative to point out that this Petition brings to the fore the doctrine of constitutional avoidance. On this score, I find useful guidance in the decision by the Supreme Court of Kenya in *Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others* [2014] eKLR where it was held that:
- “The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mblungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:
- “I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”
38. And further, in the case of *Gabriel Mutava & 2 others vs Managing Director, Kenya Ports Authority & another* (2016) eKLR, the Court of Appeal held that:
- “Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation... Of course, violations of constitutional rights may nonetheless be different, and more serious than the violations of statutory or contractual rights. There is no clear demarcation however, where one violation begins and ends, and when one violation should attract desperate remedies. In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent



that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. The *Constitution* should not be turned into a thoroughfare for resolution of every kind of common grievance...In saying all these, we are not oblivious to the fact that a party is entitled to sue under the *Constitution* even if there is an alternative remedy, and or other mechanism for the resolution of the dispute. However, it has since emerged on the authorities that constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional Litigation is not a panacea for all manner of litigation, we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.”

39. Applying the findings in the above authorities to the case herein, I am of the firm view that this was a case that would have been well articulated through a Memorandum of Claim for unlawful termination under the *Employment Act*, 2007 as opposed to a constitutional petition.
40. Having found that the Petitioner has not disclosed any constitutional violation, the remedies she seeks cannot issue.

Orders

41. In the end, I find that the Petition is not merited and the same is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF DECEMBER, 2023.

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STELLA RUTTO

JUDGE

