



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO E031 OF 2020

IN THE MATTER OF ARTICLE 22 OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLES 10, 19, 20, 22, 23, 27, 28, 35, 41(1), 43, 47, 50, 236(B), AND 258 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF CONTRAVENTION SECTION 4 OF THE FAIR ADMINISTRATIVE

ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF CONTRAVENTION OF SECTION 5 OF THE ACCESS

TO INFORMATION ACT NO. 31 OF 2016

AND

IN THE MATTER OF CONTRAVENTION OF SECTION 45 OF THE EMPLOYMENT ACT

BETWEEN

FRANCIS MUSAU MUTUSE.....PETITIONER

VERSUS

THE KENYA MEAT COMMISSION.....RESPONDENT

JUDGMENT

1. This Petition is brought under Article 22(1) as read with Article 258 of the Constitution of Kenya, 2010.
2. The Petitioner states that he was employed by the Respondent as an Accounts Clerk vide letter dated 19th October 2012.
3. The Petitioner was arrested and thereafter charged on 28th May 2015 before the Chief Magistrate's Anti-Corruption Court in *Anti-Corruption Case No. 9 of 2015*.
4. Subsequent to being arraigned in court, the Petitioner was interdicted with effect from 17th June 2015. On 9th April 2018, the Petitioner was discharged under Section 89(5) of the Criminal Procedure Code.
5. The Petitioner states that he had a legitimate expectation that upon being cleared of the charges, his interdiction would be lifted and that he would be reinstated back to work.

6. On 10th April 2018, the Petitioner reported to work and enquired as to why he had not been recalled but he did not get any response from the Respondent.
7. On 17th September 2018, the Petitioner wrote to the Respondent asking about the fate of his employment. He states that the Respondent informed him verbally that he would be called by the Head of Human Resource but he was never called. On 10th June 2020, the Petitioner was summarily dismissed, with the dismissal being backdated to June 2015.
8. The Petitioner avers that the Respondent's actions amount to violation of his fundamental rights and freedoms under Articles 10, 19, 20, 22, 23, 27, 28, 35, 41(1), 43, 47, 50, 162, 236(b) and 258 of the Constitution.
9. He adds that the Respondent's actions further violate Section 4 of the Fair Administrative Action Act, Section 5 of the Access to Information Act and Section 45 of the Employment Act.
10. The Petitioner seeks the following remedies:
 - a) A declaration that the Petitioner was unlawfully and unfairly dismissed;
 - b) An order of mandamus compelling the Respondent to issue the Petitioner with a Certificate of Service;
 - c) An order of mandamus compelling the Respondent to pay the Petitioner Kshs. 79,000 being salary in lieu of notice;
 - d) An order of mandamus compelling the Respondent to pay the Petitioner Kshs. 948,000 being damages for unfair termination;
 - e) An order of mandamus compelling the Respondent to pay the Petitioner Kshs. 1,092,000 being salary withheld from the date of acquittal to the date of summary dismissal;
 - f) An order of mandamus compelling the Respondent to pay the Petitioner Kshs. 78,000 being half salary for the months of May and June;
 - g) An order for exemplary and punitive damages on account of gross violation of the Petitioner's fundamental rights and freedoms;
 - h) Costs of the Petition.
11. The Respondent's response is by way of a replying affidavit sworn by its Human Resource & Administration Manager, Albert Nyauntu on 2nd November 2020.
12. Nyauntu confirms that the Petitioner was employed by the Respondent as a clerk.
13. He depones that in the course of time, disciplinary issues concerning the Petitioner's performance and ethical probity arose, leading to show cause letters being issued to the Petitioner.
14. Nyauntu further depones that barely three years after the Petitioner's employment, funds belonging to the Respondent were embezzled and upon being suspected of involvement in the embezzlement, the Petitioner was arrested and charged with the offence of conspiracy to commit an economic crime contrary to Section 47A as read with Section 48(1) of the Anticorruption and Economic Crimes Act, 2003.
15. Upon being charged and having taken plea, the Petitioner was interdicted by letter dated 26th June 2015.
16. Nyauntu states that the Petitioner and his co-accused were discharged on the basis that the charges against them had been recommended by the Ethics and Anti-Corruption Commission at a time when it was not properly constituted.
17. Upon receiving requests from the Petitioner and his co-accused to be reinstated, the Respondent wrote to the Ethics and Anti-Corruption Commission on 24th May 2018, enquiring about the status of the criminal case.
18. Nyauntu depones that vide letter dated 24th July 2018, the Commission informed the Respondent that the Petitioner and his co-accused had only been discharged and that the file was under review.
19. Nyauntu goes on to state that because the Petitioner was not cleared by the Ethics and Anti-Corruption Commission and upon consideration of the Petitioner's response to the charges levelled against him, the Respondent found the Petitioner guilty of gross misconduct and consequently summarily dismissed him vide letter dated 10th June 2020.
20. The Petitioner swore a supplementary affidavit on 4th December 2020 in which he states that by dismissing him, the Respondent condemned him unheard.
21. The Petitioner denies culpability in the embezzlement of the Respondent's funds and asserts his innocence.

Determination

22. The first issue for determination is whether the Petitioner's pleadings constitute a proper constitutional petition.

23. In its written submissions, the Respondent made reference to the decision in *Patrick Mbau Karanja v Kenyatta University [2013] eKLR* where **Lenaola J** (as he then was) stated the following:

“I should only say this as I conclude; in Francis Waithaka v Kenyatta University Petition No. 633 of 2011, this Court was categorical that it is imperative that the Bill of Rights and the Constitutional interpretative mandate of this Court should not be invoked where other remedies lie.”

24. **Lenaola J** (as he then was) restated this basic principle in *Bernard Murage v Fineserve Africa Limited & 3 others [2015] eKLR* as follows:

“...not each and every violation of the law must be raised.....as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy should be pursued first.”

25. More recently in *Grays Jepkemoi Kiplagat v Zakayo Chepkonga Cheruiyot [2021] eKLR Mutungi J* stated:

“...I agree that matters that do not call for the Court's Constitutional interpretative mandate under the Bill of Rights provisions of the Constitution should not be disguised as Constitutional Petitions seeking enforcement of the Bill of Rights. There ought to be a clear delineation of constitutional matters and ordinary civil suits.”

26. The entire Petitioner's case is based on an employment contract between himself and the Respondent. In fact, his prayers which he fashions as prerogative writs in the nature of declaration and mandamus all fall within the ambit of statutory remedies provided under the Employment Act. If every employment dispute were to be elevated to a constitutional petition, there will be no more ordinary causes before the Employment and Labour Relations Court. This could not have been the intention of the framers of the Constitution.

27. What is more, the current Petition does not disclose violation of any fundamental right or freedom as defined in the celebrated case of *Anarita Karimi Njeru v R [1997] KLR, 124*.

28. On the whole, I find that this Petition is an abuse of the court process and therefore strike it out, with the redemption that the Petitioner is at liberty to raise his claim by way of an ordinary cause.

29. Each party will bear their own costs.

30. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF FEBRUARY 2022

LINNET NDOLO

JUDGE

Appearance:

Mr. Mwalo for the Petitioner

Miss Nyamwaya for the Respondent