



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
ELRC PETITION NO. E031 OF 2021

GEOFFREY OPANGA MOGAMBI.....1ST PETITIONER
THOMAS KREY OGOTI.....2ND PETITIONER
JOSEPH SOMONI MOGUSU.....3RD PETITIONER
EVANS ONGWANO.....4TH PETITIONER
RONALD JUMA MECHA.....5TH PETITIONER
HENRY MAKORI NYANGERI.....6TH PETITIONER
ELIZABETH KWAMBOKA MAGABI.....7TH PETITIONER
LYDIA NYAKERARIO MANANI.....8TH PETITIONER
CHARLES IRANGA OMBOGA.....9TH PETITIONER
PETER ONUNDA KWAMESA.....10TH PETITIONER
SAMBA JOASH NYAMBONO.....11TH PETITIONER
PETER ASATI SETH.....12TH PETITIONER
JOHN MOMANYI TORORI.....13TH PETITIONER
LEWIS NYAOMA OUKO.....14TH PETITIONER
SARAH NYASUGUTA GISEMBA.....15TH PETITIONER
MBANE MORARA GEORGE.....16TH PETITIONER
RATEMO ZAPHANIA SAID.....17TH PETITIONER

VERSUS

COUNTY GOVERNMENT OF NYAMIRA.....1ST RESPONDENT
AMOS KIMWOMI NYARIBO, GOVERNOR NYAMIRA COUNTY.....2ND RESPONDENT
COUNTY SECERETARY, COUNTY GOVERNMENT OF NYAMIRA.....3RD RESPONDENT

JUDGMENT

Introduction

1. The Petitioners lodged this petition together with a certificate of urgency and Notice of Motion Application dated 5th May, 2021 and filed before court on 10th May, 2021.
2. The court declined to certify the application urgent and instead, ordered that the application and the petition be served and further fixed the matter for directions.
3. The Petitioners later withdrew the application and by agreement of the parties, the petition was canvassed by way of written submissions. The Petitioners also sought leave to amend the petition, which leave was granted.

The Petition

4. The Petitioners vide their amended petition dated 13th October, 2021, seek the following orders: -
 - a) A declaration that the summary dismissal of the Petitioners as support staff and enforcement officers by the Respondents is irregular and unprocedural and that the same was in breach of Article 47 of the Constitution of Kenya
 - b) A declaration that the actions of the Respondents in this cause violated the Constitutional rights of the Petitioners under Articles 27, 35(1) (b) and (2), 36,(1), 47, 50 (1) and 2) of the Constitution of Kenya and the Employment Act, 2007 and declare the same as illegal and illegitimate
 - c) A declaration that to the extent that the decision reached by the Respondents is discriminatory, malicious, baseless and malevolent and is a violation of Article 35 (1)(b), 47 and 50(1) of the Constitution therefore null and void ab initio
 - d) An order against the Respondents to retract the decision to remove the employees from the payroll within 14 days
 - e) An order of Judicial Review of certiorari be issued to remove into this Honourable court for quashing the decision of the Respondents to remove county employees from the payroll, interdiction and subsequent summary dismissal as conveyed by letters issued by the Respondents and without due regard to the provisions of the County Government Act, No. 17 of 2012, Employment Act, 2007 and Article 10 of the Constitution of Kenya 2010.
 - f) An order declaring that the said decision of the Respondents prompting to remove county employees from the payroll, interdicting and subsequent summary dismissal was illegal and irregular and the same be brought into the court and be quashed by an order of certiorari
 - g) A permanent injunction restraining the Respondent either by themselves, agents, servants and/or employees, from removing the Petitioners from the payroll of the County Government of Nyamira and/or stopping any payments to and/or in favour of the said employees, either on account of remuneration, allowances and/or salaries whatsoever and/or howsoever.
 - h) An order for payment of salaries in arrears from the month of April, 2019 and remittance of statutory arrears to NSSF and NHIF
 - i) The Honourable court do order that the costs of the Petition be borne by the Respondents
 - j) Such other orders as this Honourable court shall deem fit and just to grant in the circumstances.
5. The petition is supported by grounds on the face thereof including:
 - i. That the Petitioners were issued with letters of interdiction and subsequently dismissed on the 7th of April, 2021 without being heard as required by law, hence a breach of Article 47 of the Constitution
 - ii. The Petitioners further state that they wrote to the Respondent requesting for information on the then ongoing payroll clean up process as well as reasons why their salaries were stopped pursuant to Article 1, 10, 19(1), 21(1) and 35(1) of the Constitution and Access to information Act, but that they did not receive responses on their requests.
 - iii. The Petitioners states that their summary dismissal is in flagrant breach and violation of the County Government Act, 2012, Employment Act, 2007 and has led to an unfair labour practices as it does not meet the Constitutional requirements of a fair administrative action.
 - iv. It is the Petitioners' case that they were employed through a fair process and that the Respondents will not suffer any irreparable

loss. They aver that the 4th Respondent has been recommending the admission of other employees to the payroll, while leaving others out without communication on the criteria adopted in the admittance.

v. The Petitioners state that the actions of the Respondents amount to discrimination, unfair administrative action, unfair hearing and thereby constitutes unfair labour practices. It is their case that the acts complained of are a violation of the Petitioners Constitutional rights under Articles 2(2), 27, 47, 50 and 236 of the Constitution, 2010.

vi. The Petitioners' case is that failure to grant conservatory orders would sanitize unfair labour practices and conspiracies carried out at the instance of the Respondents.

6. The Respondents opposed the petition through a Replying Affidavit sworn by Emmanuel Mokoro, the County Chief Officer for Public Service Management of the 1st Respondent.

7. The Respondents' admit that the Petitioners were their employees who qualified for placement in its employ through a recruitment process undertaken by the Respondents.

8. The Respondents' further state that in the course of employment, the Petitioners were deployed to various departments and offices within Nyamira County. The Respondent further states that it was a requirement that upon appointment, the Petitioners were required to submit their testimonials and academic certificates, which they did as advised.

9. The Respondents states that concerns were raised on the persons appointed for various positions in the service of the 1st Respondent, resulting in the need for vetting of all the offer letters from the recruitment process which included those of the Petitioners.

10. The Respondents states that they requested the Kenya National Examination Council (KNEC) to verify the authenticity of the academic certificates of the employees of the 1st Respondent which included those of the Petitioners.

11. The Respondents aver that KNEC submitted their report on the verification on 9th March, 2017, where they confirmed several certificates to have been forged including those of the Petitioners.

12. The Respondents states that pursuant to the KNEC report, they interdicted the Petitioners and invited them to show cause why disciplinary action should not be taken against them. It is their position that some of the affected officers including the Petitioners responded to the show cause letters, while others did not respond.

13. The Respondents states that they considered the responses submitted by the Petitioners and arrived at a decision to summarily dismiss the Petitioners on account of the forged certificates.

14. The Respondents aver that the dismissal letters send to each of the Petitioners informed them of their right of appeal which should be lodged within 7 days of the date of the dismissal letter. It is the Respondents' further case that some of the Petitioners filed appeals against their dismissal while others did not.

15. The Respondents states that in addition to the written appeals, the Petitioners and other affected officers were further advised to lodge appeals to the Appeals Board and appear to present their respective cases. The Respondent states that the appeals proceeded and the Appeals Board upheld the decision to summarily dismiss the Petitioners and other staff that were affected.

16. The Respondent states that they had valid and justified reasons to summarily dismiss the Petitioners and that they did so within the confines of the law, specifically Section 44 of the Employment Act, 2007. They aver that the dismissal was on account of gross misconduct to wit forged academic certificates

17. It is the Respondents' position that they complied with due process in dismissing the Petitioners. They aver that the Petitioners have admitted receiving letters of interdiction and show cause, half-salary during the interdiction period, responses to the show cause letters, written appeals and oral presentation of the appeals before the Appeals Board.

18. The Respondents further case is that the Petitioners have not challenged the grounds upon which their dismissal is premised and have not produced any documents to counter the grounds/reasons for their summary dismissal.

19. Parties filed submissions in support of their various position in the matter.

The Petitioners' Submissions

20. It is submitted for the Petitioners that the issues for the court to determine are whether the termination of the Petitioners through summary dismissal was lawful, whether the Petitioners' rights to fair labour practices were violated and whether the Petitioners are entitled to the prayers sought.

21. It is submitted for the Petitioners that the procedure followed in summarily dismissing the Petitioners was not lawful as the same was carried out without adhering to the mandatory provisions of the Employment Act. They sought to rely on the Court of Appeal holding in the cases of *Standard Group Limited v Jenney Luesby (2018) eKLR* and *Moi Teaching and Referral Hospital v James Kipkonga Kendagor (2019) eKLR* to support this position.

22. It is submitted for the Petitioners that the failure by the Respondents to accord them a hearing and a process that is fair as required under Article 47 of the Constitution and Section 4 of the Fair Administrative Actions Act, violated their constitutional rights to fair labour practices.

23. It is further submitted for the Petitioners that they are entitled to the reliefs sought and that the court should issue orders reinstating them and award them 12 months' salary in compensation for unlawful termination.

The Respondents' Submissions

24. The Respondents submitted that the summary dismissal of the Petitioners was lawful and justified under the circumstances of the case. It is their submission that the petition lacks merit and ought to be dismissed with costs.

25. It is submitted that the Petitioners have steered clear of the reasons leading to their dismissal and have opted to challenge the procedure adopted in the dismissal, instead of addressing the reasons as to why they had to be taken through the process. It is submitted that although the Respondents raised issues of forged academic certificates, the Petitioners have not bothered to challenge the same either through a supplementary affidavit or further affidavit.

26. It is further submitted for the Respondents that the summary dismissal of the Petitioners is based on the provisions of Section 44 of the Employment Act that permits an employer to summarily dismiss an employee for gross misconduct. The Respondents further submit that their reasons for dismissing the Petitioners are valid and fair and that the dismissal was procedurally fair.

27. It is submitted for the Respondents that the dispute before hand is a labour dispute that squarely falls within the purview of the Employment and Labour Relations court and that the Petitioners only gave it a Constitutional trajectory by alleging constitutional violations upon realizing the seriousness of the reasons for their dismissal.

28. The Respondents submit that the petition before court is not merited and urge that the court dismisses it with costs.

Analysis and Determination

29. The Constitutional provisions upon which the petition is premised are Articles 22 on the enforcement of the Bill of rights, 47 on fair administrative action, 201 on principles of public finance and 235 on the responsibility of a county government.

30. The Petitioners have largely relied on the provisions of the Employment Act and the County Government Act to anchor their petition and not the constitutional provisions upon which the petition is premised. As correctly submitted by the Respondents, the Petitioners have failed to demonstrate with precision, the Articles of the Constitution violated by the Respondents to qualify this as a Constitutional petition and not an ordinary cause. (*See Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 others (2013) eKLR*). I will nonetheless address the issues raised in the petition.

31. The Petitioners' main issue is that their summary dismissal by the Respondents neither adhered to the laid down law on procedure nor was it based on valid, fair and justified reasons.

32. The Respondents have given a chronology of events culminating in the summary dismissal of the Petitioners and other staff in their service. They have given the procedure adopted in the summary dismissal as well as the reasons upon which the dismissal is premised.

33. On the question of procedure, the Employment Act, 2007 has clearly spelt out the procedure that an employer must adhere to when contemplating termination/dismissal of an employee.

34. Section 41(1) of the Employment Act, 2007 provides as follows:

“Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

35. It is not disputed that the Respondents issued the Petitioners with letters of interdiction and show cause and which some of the Petitioners responded to.

36. The Respondents' evidence is that they asked the Petitioners to appear before the appeals board for a hearing of their appeals. The issue becomes whether this ideally is the stage at which an employee is required to appear before a discipline panel when a decision has already been made to terminate their services through summary dismissal.

37. The Respondents in my view realized that they missed a stage in the disciplinary process and were trying to cleanse the process by requiring that the Petitioners appear for an oral hearing at the appeal stage. The Petitioners appeared before the Appeals Board, the missed steps notwithstanding.

38. The issue for this court is whether the failure by the Respondents to give the Petitioners an oral hearing during the initial disciplinary hearing was fatal to the proceedings. The Petitioners were given an opportunity to make written representation, and which most of them did. For those that did not respond to the show cause letters, it was by choice and they lost the opportunity to ventilate their case.

39. In the opinion of this court, the failure by the Petitioners to make oral representation was not fatal to the hearing for reason that the Petitioners are not the makers of the documents subject of that hearing. They would still have gotten a written confirmation from the Kenya National Examination Council to confirm the authenticity of their certificates in response to the show cause. They did not. Nothing they would have told the disciplinary committee during an oral hearing would have changed the position that their certificates are forged.

40. The Court of Appeal in the case of *Judicial Service Commission v Gilbert Mwangi Njuguna & another (2019) eKLR*, held that an opportunity to produce full and complete written documentation was sufficient and an oral hearing is not always necessary to ensure a fair hearing and consideration of the issues. In the circumstances of this case, written representation was sufficient to clarify the issue subject of the disciplinary proceedings.

41. I find and hold that the Respondent adhered to the mandatory tenets of procedural fairness and the dismissal of the Petitioners was not unfair and neither was it unlawful.

42. On the question of substantive justification, the reasons given by the Respondents for dismissing the Petitioners, is that they used forged academic certificates to get themselves appointed to the impugned positions.

43. The Petitioners used forged documents to qualify for jobs they would otherwise not have qualified for. Further, the Petitioners have not adduced any evidence to show that the certificates subject of the disciplinary process and the subsequent dismissal, are authentic/valid documents contrary to the Respondents' assertion.

44. The Court of Appeal in the case of *Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR* set out the legal requirements that an employer must prove to substantively justify the dismissal/termination of an employee in the following words: -

“..... The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5)).”

45. The Respondents have produced evidence, being letters from the Kenya National Examination Council showing that indeed the Petitioners were appointed to the positions now impugned, on account of forged academic certificates. This, in my view, was a valid, fair and justified reason to dismiss the Petitioners.

46. The court follows the holding of the Court of Appeal in the case of *Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR*, and holds that it was eminently reasonable for the Respondents to summarily dismiss the Petitioners on account of their unauthentic, forged and altered academic certificates.

47. The court finds the reasons for the dismissal of the Petitioners valid, fair and justifiable (**See Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union [2017] eKLR**).

48. The upshot is that the Petition herein is dismissed in its entirety.

49. In view of the fact that the Petitioners are currently unemployed, I make no orders as to costs.

50. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 3RD DAY OF FEBRUARY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Wesong h/b for Mr. Ochoki for the Petitioners

Mr. Oange present for the Respondents

Christine Omollo- C/A