



**Awino v Prosecution (Petition E003 of 2021)  
[2022] KEELRC 43 (KLR) (26 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 43 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E003 OF 2021  
NZIOKI WA MAKAU, J  
APRIL 26, 2022**

**BETWEEN**

**WILKISTER AWINO ..... PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

**JUDGMENT**

1. In the Amended Petition dated 12<sup>th</sup> March 2021, the Petitioner prays that judgment be and is hereby entered against the Respondent for:-
  - i. An order of Prohibition to stop the Respondent from implementing and or continuing with the implementation of the Interdiction Letter dated 9<sup>th</sup> December 2020 as amended vide the letter dated 14<sup>th</sup> December 2020 and any disciplinary action based upon it against the Petitioner.
  - ii. An order of certiorari to remove into this Court for quashing and to quash the Interdiction Letter dated 9<sup>th</sup> December 2020 as amended vide the letter dated 14<sup>th</sup> December 2020 and any disciplinary action based upon it against the Petitioner.
  - iii. An order of *mandamus* to compel the Respondent to re-instate the Petitioner to her employment, full pay and benefits that she was enjoying before her interdiction, and to accord the Petitioner her chance to career advancement and promotion that was due to her before her interdiction, and to promote her accordingly.
  - iv. A declaration that any adverse disciplinary action taken against the Petitioner, and her interdiction for acts undertaken as a prosecutor performing the official functions and duties of the Respondent in Ngong CM Miscellaneous Criminal Application No. E023 of 2020, and the Interdiction Letter dated 9<sup>th</sup> December 2020 as amended vide the letter dated 14<sup>th</sup> December 2020, the curtailment of the Petitioner's career advancement and the refusal of



the Respondent to provide a working environment that has denied the Petitioner equal opportunity in the work place, are unconstitutional and in breach of Articles 10, 27, 41, 47, 50, 232 and 234 of *the Constitution*.

- v. Compensation and damages for persistent violation of fundamental rights and the provisions of *the Constitution*.
  - vi. Costs.
2. The Petitioner avers that she was appointed to the civil service as State Counsel II, SLG 1 with effect from 23<sup>rd</sup> March 2011 and deployed to the State Law Office whereat she was thereafter promoted to the position of State Counsel I, SLG 2 with effect from 15<sup>th</sup> January 2014. The Petitioner avers that when her services were transferred from the State Law Office to the Respondent, she retained the same employment Personal File she had when she was admitted to the civil service and which the Respondent confirmed as much in its confirmation letter dated 28<sup>th</sup> July 2017. The Petitioner avers that she was appointed Senior Prosecution Counsel DPP 8 Job Group 'M' and deployed to the Respondent's Nairobi office's Economic, International and Emerging Crimes Department where she was to report to on resumption from maternity leave. The Petitioner avers that she reported to the station on or about 29<sup>th</sup> October 2014 and upon confirmation of her appointment, was re-admitted to permanent and pensionable establishment with effect from 22<sup>nd</sup> July 2014. The Petitioner was thereafter, on or about November 2018, re-deployed to head the Respondent's Ngong' Sub-County Office where she reported and worked diligently despite the deplorable working conditions that included non-support staff. The Petitioner avers that she appealed against her transfer to the Ngong' Sub County Office on medical grounds but her appeal has never been heard or considered to date without any reason considering other colleagues had their appeals against their transfers reviewed timeously.
  3. It is the Petitioner's averment that the Respondent issued her with an Interdiction Letter dated 9<sup>th</sup> December 2020 pursuant to media publications on a case Ngong CM Miscellaneous Criminal Application No. E023 of 2020 under investigations by the Kajiado DCI wherein an application had been made to hold suspects from the Ngong Lands Registry at the DCI Kajiado for further investigations. The Petitioner avers that she was interdicted without notice of any complaint against her and had not been given an opportunity to be heard prior to the interdiction letter being given to her and that the Respondent's action was not justified. The Petitioner avers that the interdiction letter alleged that she together with her colleague and the Senior Principal Magistrate at the Ngong Law Courts had conspired to grant certain orders in favour of 15 staff of Ngong Land Registry who had been arrested for corruption. The Petitioner avers that the letter further alleged she had been discourteous, rude and unprofessional in dealing with members of the public and stakeholders. The Petitioner further avers that the Respondent replaced her on 7<sup>th</sup> December 2020 from her posting at the ODP's Ngong Sub-County Office without re-deploying her and that her interdiction is intended to destroy her professional reputation and lead to her dismissal from public service. The Petitioner avers that both the Public Service Commission (PSC) and the Respondent neglected her appeal against the interdiction and indicated she would remain interdicted until determination of her case which case she contends does not exist.
  4. She avers that the Respondent refused to lift her interdiction which lapsed on or about 9<sup>th</sup> March 2021 or communicate to her about the investigations or determine the disciplinary action it had commenced with the said interdiction. The Petitioner avers that she has been on half pay which has made her fall behind her loan repayments and continues to be denied her full salary and employment benefits without any lawful just cause and in violation of her Constitutional Rights. Furthermore, the



Respondent had on or about 23<sup>rd</sup> December 2020 lifted the interdiction of her colleague she had jointly been interdicted with over similar charges and which indicated that any alleged investigations had been concluded. The Petitioner further avers that the disciplinary action is the reason the Respondent continues to detain her in the same job group for over 7 years without any promotion which she has been due for.

5. The Petitioner avers that she acted professionally, diligently and in good faith with regards to the Ngong Land Registry case aforementioned which the Court considered and gave its own orders founded upon her discretionary powers. It is the Petitioner's averment that the interdiction and disciplinary action violates her right to equality and freedom from discrimination under Article 27(1) and (2) of *the Constitution* as it denied her equal benefit and equal protection of the law. The Petitioner avers that her right to fair procedure, impartiality and fair administrative action under Article 47(1) is equally not guaranteed considering the long period of time she has been on interdiction awaiting determination of her case, in violation of her right to natural justice. She avers that the Respondent has also violated her right to a fair hearing guaranteed by Article 50(1) and her right to fair labour relations protected under Article 41(1) of *the Constitution*.
6. The Petitioner further avers that the Respondent's actions violate the national values and principles of governance of the rule of law, human dignity, equity, social justice, equality, human rights and non-discrimination that are protected under Article 10(2)(a) and (b) of *the Constitution* which it has failed to consider or uphold. That the Respondent has failed to accord her adequate and equal opportunities for promotion as provided for under Article 232(1)(g) and (i) of *the Constitution* respectively and has usurped the powers of the Public Service Commission over disciplinary control in the public service under Article 234(2)(b) of *the Constitution*. The Petitioner annexes in her Verifying Affidavit, documents marked WAO 1 to WAO 9 in support of her case.
7. The Respondent did not file any response to the Petition.
8. The Petitioner submits that whereas the PSC has delegated to the Respondent, as its Authorised Officer, five disciplinary powers under Section 65(2)(a)(i-v) of the Public Service Commission Act 2017 (PSC Act), the Respondent cannot unilaterally exercise the powers to interdict, to suspend or to stop, withhold or defer a normal increment of a public officer without reference to the PSC, or the ODPP Advisory Board. She also cites several provisions of the PSC Act demonstrating that the PSC emphasizes justice, due process, the promotion and protection of human rights and fundamental freedoms of public officers facing disciplinary action, the right to natural justice, and the right to fair administrative action as enshrined in *the Constitution*. That Section 15 of the ODPP Act 2013 also grants immunity from liability to members of staff, officers and agents of the ODPP for action taken lawfully and in good faith in the execution of the functions, powers or duties of the office, such as that which the Petitioner took in Ngong Misc. Criminal Application No E023 of 2020.
9. She submits that Clause 4.2(c) of the Disciplinary Manual for the Public Service, May 2016 provides that interdiction must be grounded upon a show cause letter which must be served upon the affected public servant and be signed by the authorised officer; which did not happen in the instant case as her interdiction letter was signed by an unqualified person who was not the Authorised Officer. That paragraph 11.17.5.5 of the ODPP HR Manual specifically provides that Interdictions shall not exceed three months within which investigations are concluded and action is determined. She submits that the letter dated 14<sup>th</sup> December 2020 by the ODPP in response to her appeal had two contradictions namely: her interdiction would last until conclusion of investigations of her case, and that the ODPP Human Resource Manual was applicable to her and not the PSC Manual 2016 it had earlier relied on in the interdiction letter dated 9<sup>th</sup> December 2020. That with this information, the Respondent however ignored the import of paragraph 11.17.5.1 of the ODPP HR Manual which applies interdiction only



in serious disciplinary cases that require investigations to establish facts unlike in her case where the Respondent had already verified the information before removing her from its Ngong Office and 3 days thereafter interdicting her. Further to this, the Respondent has prolonged the interdiction period for almost one year contrary to the provisions of paragraph 11.17.5.5 of its Manual and that her disciplinary process has stalled.

10. The Petitioner further submits that going by precedent, and considering that the interdiction was not necessary in her case, it follows that she was interdicted to stop her promotion which was imminent and that the Respondent discriminated against her. That this Court ought to consider the violation of her human rights and fundamental freedoms with the background that the motive of the Respondent is to deny her career fulfilment and to frustrate her at the work place. She submits that the Respondent's reasons for her continued interdiction are vague and ambiguous and that it has not given any justifiable reason why the ODPP Advisory Board has not sat to consider the Petitioner's case, if at all, as provided for under Section 17(3) of the ODPP Act 2013. That in any event, Section 69(8) of the PSC Act shows that the ODPP Advisory Board does not consider the recommendations or findings of the investigator upon the end of investigations into the alleged misconduct.
11. It is the Petitioner's submission that the interdiction is invalid, does not meet the requirements of substantive and procedural fairness, is not based upon fair reasons and has been implemented without regard to the 3-Dimensional Criteria held by the Court in *Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 others* [2014] eKLR that:
  - a. The Employer must have a justifiable reason to believe the employee has engaged in serious misconduct to form a prima facie case;
  - b. There must be some objectively justifiable reason to deny the employee access to the work place based on the integrity of any pending investigation into the alleged misconduct, or some other factor that would place the investigation or the interest of the affected parties in jeopardy; and
  - c. The employee is given the opportunity to state her case or to be heard before any final decision to interdict is given.
12. The Petitioner also relies on the case of *Janet Achieng v University of Nairobi* [2015] eKLR where the Court held that employment and labour rights are well secured in the Bill of Rights under Article 41 of *the Constitution* and that discrimination in the employment sphere is outlawed under Article 27 of *the Constitution*. The said Court further held that it had a duty to intervene where an employer's action has failed to comply with the relevant legal and policy parameters. On the issue of the unauthorised exercise of disciplinary powers of dismissal by an unqualified person, the Petitioner relies on the case of *Christopher Amasava v Kenya Revenue Authority & Another* [2021] eKLR where the Court held that the petitioner's dismissal was unlawful and irregular in the absence of proof of such delegation of disciplinary powers by the authorized officer. She submits that similarly in the instant case, the interdiction, alleged investigations and the whole disciplinary process undertaken by the Respondent, and or under the purport of his direction, are unlawful and irregular for having been initiated and continued by an unqualified person.
13. The Petitioner submits that owing to the Respondent's insistence at commencing and initiating the impugned disciplinary process, interdiction and discrimination against her career development, the violation of her constitutional rights, and the injury she has suffered and continues to suffer, she prays for compensation and damages of Kshs. 10,000,000/- and or as shall be deemed just and fair by this Court, and for costs and interest on the same.



14. The Respondent submits that Section 5(2) of the ODPP Act provides the powers and functions of the DPP while Section 5(4)(g) provides further powers to do all such other things as are necessary or incidental to the performance of functions of the DPP under the Constitution, the ODPP Act or any other written law. The Respondent submits that Section 6 of the ODPP Act and Article 157(10) of the Constitution of Kenya guarantee the independence of the DPP in the exercise of his powers or functions and that all criminal prosecutions, appointment of staff and disciplinary actions are thus within Section 5(4)(g) of the ODPP Act. The Respondent submits that Section 33 of the ODPP Act also empowers the DPP to appoint members of staff of the ODPP and that it ends therefore that the DPP does not exercise his powers as per the dictates of the PSC. It is the Respondent's submission that the Petitioner was under investigation before filing the Petition herein and that since she has not been dismissed the Petition does not meet the threshold and should be dismissed. It submits that the reliefs the Petitioner seeks are not tenable against the Respondent. As regards the Order of Prohibition sought by the Petitioner, the Respondent cites the case of Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, where the Court while referring to Halsbury's Law of England, 4<sup>th</sup> Edition, Vol. 1 at page 37, para 128, stated that an order of prohibition lies for excess or absence of jurisdiction and for a departure from the rules of natural justice and that it does not lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. The Respondent submits that it acted within its jurisdiction pursuant to Section 5(2) and (4) of the ODPP Act by temporarily relieving the Petitioner of her duties pending investigation, and that the prayer for order of prohibition should thus fail for lacking merit.
15. As regards the Order of Certiorari, the Respondent submits that seeking to quash the interdiction letter dated 9<sup>th</sup> December 2020 as amended vide the letter dated 14<sup>th</sup> December 2020 and any disciplinary action based upon it, can only be issued if the Court is satisfied that the right to fair administrative action under Article 47 of the Constitution of Kenya and Section 4(3) of the Fair Administrative Action Act, 2015 have been violated. The Respondent submits that considering it has not taken any adverse administrative action against the Petitioner who was invited to appear before the Sub-Committee of the Advisory Board on Discipline on 15<sup>th</sup> December 2021 for an opportunity to be heard and make representations, the prayer for Order of Certiorari is premature and cannot stand the test.
16. As regards the Order of *Certiorari* seeking to reinstate the Petitioner to her employment, the Respondent submits that the said order will similarly not be tenable against it at this stage because investigations against the Petitioner are not yet over. The Respondent submits that the Court in the case of Kenya National Examination Council v Republic (supra) adopted that to issue an order of *mandamus* in a matter which is in the discretion of the court, a party seeking the same must:
- i. Demonstrate existence of a legal right to the performance of a legal duty;
  - ii. the legal duty must be of a public nature; and
  - iii. the party against whom a *mandamus* is sought must have failed, despite the demand to perform the legal duty to the detriment of the party who has the legal right to expect the performance.
17. The Respondent submits that it does not owe the Petitioner any duty of public nature to reinstate her before the final decision of the Board is made. Further, interdiction implies that an employee or officer is temporarily relieved of her duties pending investigations and or disciplinary action and the



Petitioner is therefore still in employment. It relies on the case of *Republic v Inspector General of Police Exparte Kennedy Ngeru Irungu* [2016] eKLR where Aburili J. observed:

“ Thus, mandamus will not be granted where to do or not to do an act is left to the discretion of the authority. The duty must be imperative and should not be discretionary. Further, it is clear that mandamus will issue where there is a legal right and there is no specific legal remedy for enforcing it. Nonetheless, mandamus may issue in cases where there is an alternative legal remedy but that mode of redress is less convenient, less beneficial and less effective.”

18. It is the Respondent’s submission that no final decision has been reached to warrant averments of breach of natural justice and that its actions have so far been procedural and within the tenets of *the Constitution*. That the Petitioner has also not demonstrated to this Court the extent of the violation of her fundamental rights and her prayer for compensation should thus be dismissed.
19. The Petition hangs on the interpretation of the actions by the Respondent. The Petitioner seeks a raft of reliefs against the Respondent for the interdict contained in the Interdiction Letter dated 9<sup>th</sup> December 2020 as amended vide the letter dated 14<sup>th</sup> December 2020. The interdiction is the only action that has taken place as the Petitioner has successfully challenged the same before the Court. Granted the Respondent has not taken any disciplinary action, can the orders sought for certiorari or mandamus issue? Courts here have been loathe to issue interposition against disciplinary process unless it is demonstrated beyond peradventure that the process being undertaken is improper, unlawful and manifestly unfair. In this case, the threshold for interposition by the Court has not been met and as such the Court would not grant the order to quash the interdiction letter. Secondly, mandamus would not issue as the disciplinary process has not commenced for the Court to either halt it or declare it unlawful. Mandamus is not issued for what is yet to be done. The Petitioner is not out of employment by dint of the interdiction and in the event there is disciplinary action taken, mandamus would not of right apply since the Petitioner can move the Court for appropriate remedies under Section 12 of the *Employment and Labour Relations Court Act* as well as articles 41 and 47 of *the Constitution*. The upshot of the foregoing is that the Petition is found to be premature and not merited and is accordingly dismissed. There shall be no orders as to costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF APRIL 2022**

**NZIOKI WA MAKAU**

**JUDGE**

