



REPUBLIC OF KENYA



KENYA LAW
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**Ombima v Judicial Service Commission (Petition E140 of 2021)
[2022] KEELRC 1702 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1702 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E140 OF 2021**

MN NDUMA, J

MAY 19, 2022

**IN THE MATTER OF ARTICLES 2, 10, 19, 21, 22(1), 24, 47, 50, 73(2) (B), AND
258 OF THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER
OF THE ALLEGED CONTRAVENTION AND VIOLATION OF ARTICLE
47(1) OF THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER
OF SECTIONS 4 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015
AND IN THE MATTER OF SECTION 45 OF THE EMPLOYMENT ACT, 2007**

BETWEEN

HELLEN ALUSO OMBIMA PETITIONER

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

JUDGMENT

1. The petition dated September 8, 2021 and filed on the even date seeks the following reliefs: -
 - (a) A declaration be and is hereby made that the right to a fair trial is an inalienable right pursuant to article 25(c) of the Constitution of Kenya and thus the respondent's dismissal of the petitioner from employment without fair hearing is illegal, baseless and above all unconstitutional.
 - (b) A declaration be and is hereby made that the impugned dismissal of the petitioner by the respondent without any reasonable and justifiable cause in is inimical to article 47 of the Constitution of Kenya and thus unconstitutional as it amounts to administrative action that is inefficient, unlawful, unreasonable and procedurally unfair.
 - (c) An order of *certiorari* be and is hereby issued bringing into the court and quashing the decision of the respondent communicated vide a letter dated January 4, 2021 communicating the dismissal of the petitioner from employment.



- (d) An order of *certiorari* be and is hereby issued bringing into the court and quashing the decision of the respondent communicated vide a letter dated June 28, 2021 communicating the dismissal of the Petitioner's appeal of her employment being unfairly terminated.
- (e) This honourable court be pleased to issue an order of *mandamus* compelling the respondent to forthwith and unconditionally reinstate the petitioner who was dismissed by a decision of the respondent communicated vide a letter dated January 4, 2021 without any reasonable and justifiable cause.
- (f) This honourable court be pleased to issue an order restraining the respondent by itself, its agents or anyone under its instructions from frustrating or in any other manner interfering with the petitioner's employment and employment benefits such as medical insurance to her disadvantage for the period that she is employed by the respondent.
- (g) The costs of this petition and interest thereon be provided for.
- (h) Any other order that this honourable court may deem just.

Facts of the Case

2. The petitioner sets out the facts of the case in paragraphs 14 to 39 of the petition which facts are that the petitioner was employed by the respondent as a court clerk based at Makadara Chief Magistrate Court.
3. That sometimes in the month of October, 2019, the petitioner received a memo dated September 30, 2019 informing her of the loss of exhibits in Anti-Corruption Case No 1 of 2015.
4. That later on in the same month of October, 2019, a report dated October 22, 2019 by the Chief Magistrate Makadara Law Courts indicated that while the petitioner was serving as a court clerk in Court No 2. She was negligent in handling exhibits which negligence resulted in the loss of exhibits produced in court on May 24, 2019 in Anti-Corruption Case No 1 of 2015, that included;
 - (i) Cash of Kshs 25,000
 - (ii) Half-cut envelope
 - (iii) Visual DVD recording.
5. That when Kshs 25,000 claimed to have been lost by the petitioner was marked but not produced as evidence, the petitioner was not on duty.
6. That later on, the Kshs 25,000 was produced in court as exhibit when the petitioner was on duty, but the serial numbers of the money were not captured nor was the authenticity of the money done.
7. That on the day, court adjourned at 6 pm in the evening when the registry had long been closed and this occasioned the petitioner to keep the exhibits in the Magistrate's Chambers.
8. That the cash exhibit of Ksh 25,000 claimed to have been lost by the petitioner in Anti-Corruption Case No 1 of 2015 is still actually in the possession of the court.
9. That sometimes in September, 2019, during the demonetization of the old 1000 notes, the Kshs 25,000 was ascertained to have been taken by the investigating officer who had been given the money to go and change it to the new and current 1000 notes.
10. That on November 26, 2019, the petitioner received a show cause letter dated 2November 1, 2019 requesting her to show cause why she should not be dismissed for gross misconduct.



11. The petitioner was by the said letter suspended from service until her disciplinary case was finalized. The petitioner was during the period of suspension to receive an alimentary allowance equivalent to a third (1/3) of her basic salary.
12. That on November 29, 2019, the petitioner responded in writing to the show cause letter pleading her innocence and denying the charges.
13. By a letter dated February 17, 2020, the petitioner was invited to attend a disciplinary hearing scheduled for the March 3, 2020. The petitioner was asked to bring along any supporting documents and could bring along a witness or any other representative of choice who must be a judicial staff to support her in the matter.
14. On August 24, 2020, the petitioner attended a disciplinary hearing and once again pleaded her innocence and conscientiousness in execution of her duties.
15. Sometimes in the month of January, 2021, the petitioner received a letter dated January 4, 2021 informing her of her summary dismissal from service on account of gross misconduct.
16. The dismissal was with effect from November 21, 2019, the date the petitioner was suspended from duty.
17. Further, the letter informed the petitioner that the reason for the summary dismissal was that she was negligent in handling court exhibits leading to loss of Kshs 25,000 being cash exhibit in Makadara Anti-corruption case No 1 of 2015.
18. On January 15, 2015, the petitioner wrote a letter to the respondent appealing against her dismissal from employment. The petitioner was not invited to attend the appeal hearing to mitigate her appeal but received a letter dated June 28, 2021 informing her that her appeal against her summary dismissal was considered and disallowed in view of the fact that she did not advance sufficient grounds.
19. The petitioner states that failure by Judicial Service Commission to give her a chance to be heard during her appeal was unfair and unjust. That the summary dismissal was unlawful and unfair and in violation of section 45 of the Employment Act, 2007 and section 4 of the Fair Administrative Action Act, 2015.
20. The petitioner has pleaded that the conduct by the respondent violated articles, 2, 10, 24, 47 and 50 of the Constitution as set out in paragraphs 40 to 44 of the petition.
21. The petitioner also sets out the reasons why she states that the respondent violated section 4 of Fair Administrative Actions Act, and section 45 of the Employment Act.
22. It is the petitioners case that failure to hear her out before confirming the dismissal violated her right to fair administrative action and the right to be heard under articles 47 and 50 of the Constitution and by doing so, the respondent failed to observe article 2 on the supremacy of the Constitution and the obligation not to deny the petitioner a constitutional right unless such denial is justifiable under article 24 of the Constitution.
23. The petition is supported by an affidavit of the petitioner buttressing the facts set out in the petition and has attached the letters referred to in the petition to the affidavit.

Replying Affidavit

24. The Chief Registrar of the Judiciary (CRJ), Anne A Amadi deposed to a replying affidavit opposing the petition and states that the petition is principally opposed on grounds set out under paragraph 4 of the replying affidavit as follows: -



- (a) The petition does not meet the test as enunciated in *Anarita Karimi Njeru v Republic (No 1)* [1979] KLR for the reason that it fails to particularize and prove, with the requisite degree of precision, the manner in which articles 10, 47 and 50 were violated as alleged.
 - (b) The respondent's reason for dismissing the petitioner was valid as envisaged under section 44 of the *Employment Act*, 2007 and paragraph D. 7.2 of the Judiciary Human Resources Policies and Procedures Manual, 2014.
 - (c) The petitioner's dismissal from employment was fair and just as the petitioner was accorded a fair hearing in accordance with the provisions of article 50 of the *Constitution* of Kenya and the *Fair Administrative Actions Act*, 2015.
 - (d) The respondent adhered to all the stipulated guidelines of its disciplinary process when dismissing the petitioner, as provided for under the *Judicial Service Act* and the Human Resource Manual.
25. Chief Registrar of the Judiciary deposes further that the petitioner was employed as a court assistant on July 11, 2016 and was posted to Makadara Law Courts.
26. That she is aware of the memo dated September 30, 2019, by the Chief Magistrate, Makadara to the petitioner informing her of the loss of exhibits in case No 1 of 2015 namely;
- (a) A cash of Kshs 25,000 in 1,000 notes.
 - (b) Half-cut envelope used to keep the money.
- and
- (c) A visual DVD recording.
27. That the petitioner responded to the said memo on October 1, 2019 wherein she acknowledged that on the material day, being May 24, 2019, the exhibits in issue were duly produced when she was on duty but she defended herself stating that she placed all the exhibits in the chambers of the sitting magistrate being Honourable Heston M Nyaga and that she was not involved in the disappearance of the missing currency.
28. That the Chief Magistrate Hon Emily Ominde received the said response and was not satisfied with the same and escalated the matter to the Director Human Resource Management (HRM) for further action.
29. That on October 22, 2019, Hon Emily Ominde submitted a report to the Director Human Resource Management and Administration expressing her dissatisfaction in the explanation given by the petitioner dated October 1, 2019.
30. That Chief Registrar of the Judiciary issued the petitioner with the show cause letter dated November 21, 2019 upon receipt of the report by Hon Ominde dated October 22, 2019. The said letter also notified the petitioner of her suspension and her entitlement to alimentary allowance.
31. That the petitioner responded to the charges by a letter dated November 29, 2019 wherein she stated that: -
- (a) On February 22, 2019, some exhibits were marked for identification as MFI 1 to 7. They were indicated in the day's proceedings as follows: -
 - (i) Real cash Kshs 25,000.00



- (ii) Photocopied notes of the cash – MF1 1;
 - (iii) Voice recorder – MF13;
 - (iv) Envelope – MF14;
 - (v) Inventory – MF1 5;
 - (vi) An envelope that had the smaller envelope – MF16; and
 - (vii) Transcript of the recording – MF17.
- (b) The proceedings did not indicate what happened to the said exhibits after being marked and that when the issue arose, Hon HM Nyaga summoned her and fellow colleagues. The magistrate indicated that all exhibits were handed over to the investigation officer for safe custody and the investigator was to avail them during the next hearing date.
- (c) On May 24, 2019, the exhibits that were marked for identification in court on 2February 2, 2018 were produced and marked as exhibits 1-15. Thereafter, she was handed over the envelope containing some money together with other produced exhibits. The envelope was neither opened to authenticate if the money was genuine nor was she given any register by the investigating officer to sign confirming the nature of exhibits produced in court.
- (d) She stored the exhibits at Hon HM Nyaga’s Chambers (where there were other bulky documentary exhibits) as the court had adjourned its sitting at 6.00 pm and all other offices were locked.
- (e) The petitioner could not confirm whether the said exhibits existed in the first place or were exchanged or stolen. The reason being that, they passed through several hands before reaching her. She was also absent during the time they were being checked; and she always handled court exhibits with utmost care and appeals for lifting of the suspension.
32. That the petitioner had failed to exculpate herself, as she had failed to follow the laid down procedures while handling court exhibits, as she neither authenticated the exhibits, nor handed them over to the custodian as required and expected of her as a court assistant.
33. That the matter was deliberated before the Human Resource Advisory Committee on 2May 8, 2020 and June 25, 2020.
34. That during the deliberations, it was established that the petitioner did not confirm the exhibits or hand them over to the custodian as expected. She did not follow laid down procedures in handling of the exhibits and that there was need to subject her to a disciplinary hearing.
35. That on August 6, 2020, the Advisory Committee issued the petitioner with the invitation letter for the disciplinary hearing scheduled for August 24, 2020. That the petitioner attended and produced a copy of the proceedings in Anti-Corruption Case No 1 of 2015 in her defence. That she opted not to call any witness or be accompanied by a legal counsel.
36. Chief Registrar of the Judiciary summarized the evidence adduced by the petitioner under paragraph 18 of the petition as follows: -
- (a) On the material day, the court adjourned very late in the evening – after 5.00 pm and she had nowhere else to keep the exhibits except the Magistrate’s Chambers.
 - (b) She was sorry for failing to go back and recheck on the exhibits;



- (c) It was however the responsibility of the Court Administrator to confirm genuineness of the money.
 - (d) She did not counter check the money/exhibit since she was still doing interpretation and was overwhelmed.
 - (e) There was no machine in the court or station for counterchecking money;
 - (f) She did not know what the investigating officer said on first instance about the exhibit/money. However, he later insisted the money was in custody of the court. Her colleague, Mr Khisa found the exhibit to be fake money.
 - (g) When the exhibits were availed in court, it was her colleague, Evans Khisa who was in court. Unfortunately, the magistrate allowed the police officer to go with the exhibit. However, on the date the exhibits were to be confirmed, she was in court but did not confirm them.
 - (h) She was given the money/exhibit in an envelope and did not confirm the same as per laid down procedure. There was also no register to show that she received the amount; and
 - (i) The money did not get lost but was in fake currency. Somebody might have changed it since the serial numbers did not tally.
37. That after the hearing, the Disciplinary Committee deliberated on the matter and found the charge of gross misconduct had been proved against the petitioner.
38. That on December 10, 2020, Judicial Service Commission considered the findings of the Disciplinary Committee and made a decision to dismiss the petitioner from judicial service. The petitioner was then summarily dismissed by a letter dated January 4, 2021 with effect from November 21, 2019.
39. That subsequently, the petitioner filed an appeal against the dismissal by a letter dated January 15, 2021 on grounds that: -
- (a) The money exhibit was produced on May 24, 2019 when she was the court clerk. The court adjourned past 6.00 pm. which was after official working hours.
 - (b) She kept the exhibits in the Chief Magistrate's Chambers since the Executive Officer had already closed the Registry where such exhibits used to be kept.
 - (c) She found it wise to secure the money exhibit in the Magistrate's Chambers which she felt was safer.
 - (d) She prays for a chance to appear before the Commission and defend herself because she was denied the chance.
40. That on June 24, 2021, the respondent deliberated upon the petitioner's appeal and decided that the same be disallowed in view of the fact that there was no sufficient grounds advanced. The petitioner was notified of the decision by a letter dated June 28, 2021.
41. That it is clear that the petitioner was accorded a fair hearing and the procedure adopted by the respondent in reaching its decision to dismiss her was procedurally fair.
42. That the respondent complied with article 47 and 50 of the *Constitution* and the petitioner has failed to disclose what material infringements occurred as per the test in *Anarita Karimi Njeru v Republic (No 1)* [1979] KLR and *Mumo Matemu v Trusted Society of Human Rights Alliance* [2014] eKLR.



43. That the dismissal was for a valid reason and the respondent followed a fair procedure in taking the decision to summarily dismiss the petitioner.
44. The petitioner filed supplementary affidavit joining issue with the respondent and reiterating her case as set out in the petition and the supporting affidavit. The petitioner filed her written submissions followed by the respondent in that respect.

Determination

46. The issues for determination are: -
 - (a) Whether the summary dismissal of the petitioner was for a valid reason.
 - (b) Whether the respondent followed a fair procedure in arriving at the decision.
 - (c) Whether the petitioner is entitled to the reliefs sought.
47. In answer to issues (a) and (c) the starting point is section 41 of the *Employment Act*, 2007, which provides: -

“41(1) 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.

(2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismiss an employee under section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”
48. It is common cause that the petitioner was summarily dismissed for gross misconduct in terms of section 44(3) and 44(4) of the *Employment Act*, 2007 as read with section D 7.2 of the Judiciary Human Resource Policies and Procedures Manual, 2014.
49. In view of foregoing, the governing provision regarding the procedure to be followed before the decision was taken is section 41(2) of the *Employment Act*, 2007.
50. The provisions of the *Employment Act*, 2007 apply to employees of the Judiciary in the same manner the same apply to all other employees who have not been specifically excluded from the purview of the *Employment Act*, 2007.
51. The petitioner in the present case did not make any specific pleadings in the petition that the respondent violated the provisions of section 41(2) of the *Employment Act*, 2007.
52. As a matter of fact, the facts adduced by both parties confirm that the petitioner was on November 21, 2009, charged for gross misconduct under section 44(2) and 44(4) of the *Employment Act*, 2007 read with section D (7.2) of the Human Resource Manual.
53. That the petitioner was given opportunity to respond in writing to the charges within 14 days, which the petitioner proceeded to do by a letter dated November 29, 2019.
54. It is also clear that the petitioner was given opportunity to respond in writing to the charges within 14 days which the petitioner proceeded to do by a letter dated November 29, 2019.



55. It is also clear that the petitioner was given opportunity to be heard by a disciplinary committee of the respondent on August 24, 2020. That the petitioner appeared before the said committee although she had specifically been informed that she could call any witness to support her case and could bring a staff of the judiciary of her choice to assist her in making representations to the disciplinary committee.
56. There is nothing in the petition before court which shows that the respondents violated any of the requirements under section 41(2) of the *Employment Act*, 2007.
57. The petitioner did not specifically plead, that there was inordinate delay in the conduct of the disciplinary process against her. The petitioner did not also plead that any of the persons before whom her case was heard displayed bias against her and all failed to listen to her explanation.
58. To the contrary, the explanation by the petitioner was well received and recorded by the disciplinary committee and the petitioner, in addition to pleading her innocence admitted and requested pardon for failing to go back the following day and or any other day to the magistrate's chamber where she alleged that on the material date, being May 24, 2019, she had kept the lost exhibits after 6 pm since the registry where the exhibits are ordinarily secured was closed by the time the court adjourned. The petitioner also admitted that she did not counter-check the money/exhibit since she was still doing interpretation and was overwhelmed.
59. The petitioner exonerated herself by stating that she was not on duty when the exhibits were first marked and not produced. However, clearly, the petitioner took responsibility for receiving the money and keeping it in a place that was not secure contrary to known procedures of handling exhibits and did not immediately the day after or any time soon collect the exhibits for safe keeping.
60. The petitioner did not state that she was unaware of the proper procedure to follow in securing exhibits received by her during court proceedings.
61. The evidence adduced by the petitioner fell short of proving at all, that she was not given a hearing contrary to section 50(1) of the *Constitution* or that the decision to summarily dismiss her violated the provisions of article 47(1) and (2) of the *Constitution*.
62. The court agrees with the submissions by the respondent that the petition fell foul of the principals enunciated in *Anarita Karimi Njeru v Republic (No 1)* [1979] KLR in Miscellaneous Criminal Application No 4 of 1979 - *Anarita Karimi Njeru v Republic* [1979] KLR 154.

The test was stated thus;

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

63. In terms of section 43(1) of the *Employment Act*;

“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45 of the *Employment Act*.”



64. The comprehensive evidence adduced by respondent in the replying affidavit and the documentation produced by the petitioner herself demonstrate that the respondent proved on a balance of probabilities that it had valid reasons to summarily dismiss the petitioner from employment.
65. This finding is supported by the provision of section 44(4) of the *Employment Act* which provides: -
- “Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause.....”
- (c) An employee willfully neglects to perform
- any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;” [Emphasis is added]
66. It is clear that the petitioner even though she may have had an excuse to keep the exhibits in question in the Magistrate’s chamber on May 24, 2019 due to late adjournment, it was incumbent on her to ensure that the said exhibits were collected and placed in safe custody the next morning on May 25, 2019 or any other nearer date. The petitioner did not do this for an inordinate period of time leading to the loss of the exhibits and in particular Kshs 25,000 in 1,000 notes, which she had admittedly not verified physically, before leaving the same in a place that was evidently insecure.
67. The court relies on the case of *Kenya Plantation and Agricultural Workers Union v Delmonte (K) Limited* [2019] eKLR in which the court found that the grievants had been dismissed from employment pursuant to section 44(4) (c) and (g) on account of failure to perform their duties diligently which resulted to loss of property by their employer. The court held that such conduct was sufficient reason for the employer to lawfully dismiss them from employment.
68. There is no requirement under section 41(1) or (2) for an employer to hold an oral hearing of the appeal process where the internal procedures of an organization permit employees to note an appeal against a dismissal.
69. This is a matter that is strictly governed by the document that allows the appeal and in this case the Judiciary Human Resource Policies and Procedures Manual governs this process.
70. The petitioner did not cite in the petition the provision she relied on for the proposition that she had a right to appear before the Judicial Service Commission Appeal Panel. The court cannot be left to speculative since the onus is on the person who alleges in terms of section 107 and 108 of the *Evidence Act*, cap 80 laws of Kenya.
71. The petitioner having failed to plead in the petition the basis of the alleged requirement of an oral appeal in the process has failed to prove on a balance of probability that the respondent violated article 47, 50, section 41 and 45 of the *Employment Act*, 2007 by considering the written memorandum of appeal against the summary dismissal without affording the petitioner an opportunity to appear before them.
72. On this front also the petition fails.
66. In the final analysis, the court finds that the summary dismissal of the petitioner was for a valid reason and the respondent followed a fair procedure in arriving at the decision to summarily dismiss the petitioner.



67. Accordingly, the petition is dismissed in its entirety for lack of any merit. Considering the circumstances of the case, including that the petitioner was on 1/3 of her salary during the period of suspension, the court deems this an appropriate case for each party to meet their costs of the suit.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2022.

MATHEWS N NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on March 15, 2020, this Judgment has been delivered to the parties online with their consent. They have waived compliance with order 21 rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under article 48 of the Constitution and the provisions of section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

Mathews N Nduma

Judge

Appearances

Musyoki Mogaka & Company Advocates for the petitioner

G & A Advocates LLP for the Respondent

Ekale: Court Assistant.

