



Kenya County Government Workers Union v Migori County Government & 2 others (Petition 24 of 2020) [2022] KEELRC 94 (KLR) (16 June 2022) (Judgment)

Neutral citation: [2022] KEELRC 94 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION 24 OF 2020
CN BAARI, J
JUNE 16, 2022**

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION PETITIONER

AND

MIGORI COUNTY GOVERNMENT 1ST RESPONDENT

MIGORI COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

COUNTY SECRETARY MIGORI COUNTY 3RD RESPONDENT

JUDGMENT

1. The petition herein is dated June 23, 2020 and filed in court on June 30, 2020. The Petitioner is a Labour Union that represents employees of County Governments, and presents this petition on behalf of two of her members who were employees of the County Government of Migori.
2. The Petitioner contends that the Respondents in summarily dismissing their members, violated *the Constitution* and seeks compensation for the violation of their members' Constitutional rights.
3. The Respondents did not reply to the petition but participated in the oral hearing of the petition and filed submissions in the matter. The Petition presented a Mr. Agira Awaka, one of the grievants to testify on behalf of the Petitioner.
4. Both parties filed submissions.

The Petitioner's Case

5. The Petitioner asserts that the subject employees who are her members (George Saweri Nyakwaka and Agira Awaka) were both employed as clerical officers attached to the Respondents' Lands, Housing and Urban Development Ministry on December 1, 2014. The grievants were sent on suspension on



July 24, 2015, on account of rampant falsification of accounting documents and for reason that the contents of original receipts were not replicated on the duplicate sheets.

6. The Petitioner further states that the letters of suspension did not elaborate the allegations facing the two employees, the date and the particulars of the audit, who the Auditor was, and the period covered by the audit.
7. It is the Petitioner's further assertion that the Respondent summarily dismissed the two employees through a note dated June 30, 2016, without giving them a hearing or reasons for their dismissal.
8. The Petition states that it wrote to the Respondents demanding the reinstatement of their members vide their letter of 22nd August, 2016, which letter, did not elicit a response from the Respondents.
9. The Petitioner further states that she reported the matter to the ministry of labour and a conciliation process was put in motion in a bid to resolve the issues between the grievants and the Respondents.
10. The Petitioner states that the Conciliator upon hearing the parties herein, recommended the reinstatement of her members without loss of benefits. It is the Petitioner's case that the Respondents failed and/or neglected to honour the Conciliator's recommendations, hence this petition.
11. The Petitioner avers that the Respondents breached Articles 3, 19(1), 20(2& 3), 22, 27, 28, 41, 47, 50, 73, 174, 232, 235, 236 and 258 of *the Constitution* and the provisions of the International Labour Organization Convention on Discrimination.
12. The Petitioner seeks the following reliefs:
 - i. A declaration that the Respondents are in violation of Articles 41, 47, 50, 232, 73, 74 and 236(a) and (b) of *the Constitution*, Sections 76 of the County Government Act and Sections 4 and 6 of the Fair Administrative Actions Act.
 - ii. A declaration that the Respondents discriminated against the two employees contrary to Articles 27(1) and (4) of *the Constitution*, Article 1 of the *Universal Declaration of Human Rights* and article 2 of the *ILO Convention on Discrimination*.
 - iii. An order for compensation for the violation of the two employees' constitutional guarantees
 - iv. Costs of the petition

The Petitioner's Submissions

13. It is submitted for the Petitioner that the termination of her members is unfair and unlawful as the procedure adopted by the Respondent failed both the procedural and the substantive fairness test. It is submitted that the Respondents violated the provisions of Section 41 of the *employment Act*. They sought to rely on the holding in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR.
14. The Petitioner further submitted that the Respondents violated her members right to be heard as guaranteed under Article 50(1) of *the Constitution*.
15. It is further submitted for the Petitioner that the Respondents did not provided valid and fair reasons for the termination of her members contrary to Section 45(2) of the *Employment Act*.

The Respondents' Submissions

16. The Respondents did not file a reply to the petition. They however filed submissions on the petition.



17. It is submitted for the Respondents that that petition lacks merit and should be dismissed for reason that the Petitioner did not appeal to the Public Service Commission as is required under Section 77(1) and (2) of the County Government Act, and has therefore not exhausted the existing mechanisms for dispute resolution as required under the law.

Determination

18. The issues that fall for determination are:
- i. Whether the petition as drawn violates the principle of constitutional avoidance
 - ii. Whether the Petitioner is entitled to the reliefs sought.
Whether the petition as drawn violates the principle of constitutional avoidance
19. The Petitioner in this petition challenges the summary dismissal of her members on the ground that they were not given a hearing prior to their dismissal and neither were they given reasons for the dismissal.
20. The Petitioner alleges violation of *the Constitution* and International Conventions in the manner in which her members were dismissed from the service of the Respondents. The specific Articles said to have been violated are 41, 47, 50, 232, 73, 74 and 236 (a) and (b) of *the Constitution*, Sections 76 of the County Government Act and Sections 4 and 6 of the Fair Administrative Actions Act.
21. The Petition further seeks compensation for the violation of the rights enshrined under the Articles of the Constitutional and laws stated herein. The Constitutional provisions said to have been violated relate to fair labour practices, the right to fair administrative action and the right to be heard amongst others. These are all rights that are protected under the *Employment Act*, 2007, the *Fair Administrative Actions Act* and the *Labour Relations Act*, 2007.
22. In the case of *Barbara De Klerk v Cape Union Mart International (PTY) Ltd.* Case No. C 620/2011 [2012] ZALCCT 22 the claim for unlawful dismissal was based on a provision of *Labour Relations Act* (LRA), South Africa and section 23 of *the Constitution* which provides that everyone has a right to fair labour practices. A legal objection, that is a preliminary objection, was raised to the suit on grounds, inter alia, that a claimant could not rely directly on *the Constitution* without challenging the *Labour Relations Act* which had been enacted to give effect to the right of fair labour practices. The court upheld the objection holding at paragraph [28] of the judgment:
- “The applicant has not challenged the constitutionality of the LRA in her statement of claim. It lacks the particularity it needs to sustain a cause of action as pleaded.”
23. The general principle in *Barbara De Klerk (Supra)* is that where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on *the Constitution* without challenging the legislation in question. That principle has been reinforced by the Supreme Court of Kenya in *Communication Commission of Kenya & Others v Royal Media Services Limited & 5 others* [2014] eKLR in the following words: -
- “The appellants in this case are seeking to invoke ‘the principle of avoidance’; also known as ‘constitutional avoidance’. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.”



24. The Court of appeal in *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR, held thus;
- “The article 41 rights are enacted in the *Employment Act* and the *Labour Relations Act*. The two Acts and the Rules made thereunder provide adequate remedy and orderly enforcement mechanisms...”
25. In a further case of *Daniel N. Mugendi v Kenyatta University & 3 others* [2013] eKLR, the Court of Appeal, held that in any matter falling within the statutory jurisdiction of the Employment and Labour Relations Court, the court has jurisdiction to enforce not only Article 41 rights, but also fundamental rights ancillary and incidental to the employment and labour relations including the interpretation of *the Constitution* within the matter before it.
26. The instant petition could effectively have been dealt with as a normal cause brought under substantive law and not *the constitution*. *The Constitution* is not a general substitute for normal procedure for judicial control of administrative action, and to allow such practice will trivialize constitutional litigation.
27. The Court of Appeal has now settled that constitutional litigation is not open for every claim which may properly be dealt with under alternative existing mechanisms. (See *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & Another* [2016]eKLR)
28. In conclusion, I find and hold that the summary dismissal of the members of the Petitioner was not a constitutional issue, and thus the petition does not disclose a cause of action anchored on *the Constitution*. Accordingly, the petition being incompetent, is dismissed in its entirety.
29. Parties shall bear their own costs of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 16TH DAY OF JUNE, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Awinda h/b for Mr. Odero for the Petitioner

Mr. Odero present for the Respondents

Christine Omollo- C/A

