



REPUBLIC OF KENYA



**Nyaiki v The Judicial Service Commission (Petition E064 of 2021)
[2022] KEELRC 1756 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1756 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E064 OF 2021**

**CN BAARI, J
JULY 28, 2022**

BETWEEN

PETER NYAIKI PETITIONER

AND

THE JUDICIAL SERVICE COMMISSION RESPONDENT

JUDGMENT

Introduction

1. The Petitioner filed the Petition herein dated December 16, 2021 against the Respondent alleging unfair termination of employment and challenging the Respondent's decision to dismiss him and urges that the termination be set aside.
2. The Respondent opposed the Petition vide its Replying Affidavit sworn by the Chief Registrar of the Judiciary, Hon Ann Amadi sworn on March 4, 2022, and filed in court on March 7, 2022.
3. The constitutional foundation for the petition is said to be Articles 2(1), 10(2), 22(10), 23(1), 27, 41 and 47(1), 50 (1), 75, 175, 236 and 259 of the Constitution.
4. Parties sought to canvass the petition by way of written submissions. Both parties filed their submissions.

The Petition

5. The Petitioner was employed by the Respondent in the year 2001, where he worked in various positions until December 10, 2020, when he was summarily dismissed from employment vide a letter dated January 4, 2021. The Petitioner avers that at the time of dismissal he served in the Position of Accountant 1 JSC 6.



6. The Petitioner states that he worked at Migori Law Courts in the Year 2010 to 2016, as the Accountant in charge before being transferred to Ogembo Law Courts where he worked until he was summarily dismissed.
7. The Petitioner avers that the Respondent conducted an Internal Audit at Migori Law Court inspecting revenue, deposits, procurement and expenditure management for the period from July 1, 2016 to June, 2018. He avers that the Audit was undertaken when he had long been transferred from Migori Law Court and was working at Ogembo Law Courts.
8. The Petitioner learnt vide the Respondents letter dated June 26, 2020, that the Audit Report contained allegations that he had engaged in fraudulent alteration of duplicate receipt Book Serial Number 7840701 and 7840750 and further that he did not surrender deposit totalling Kshs 17,000.00 from deposit Receipt Book Serial Number 031786 to 031800.
9. The Petitioner was then required to Show Cause why he should not be dismissed from service on Account of gross misconduct. He avers that he showed cause vide his letter dated July 7, 2020, wherein he explained that he was not the one who altered the receipts in question which were authored and/or written while the Petitioner was on his annual leave and therefore was not at work when the receipts were issued.
10. The Petitioner avers that he explained the circumstances under which he paid for the value of the altered receipts of Kshs 70,375.00
11. The Petitioner states that the Respondent constituted a disciplinary Committee which conducted a virtual hearing of his Case on September 1, 2020. The Petitioner further avers that the Respondent held a meeting on December 10, 2020, wherein it resolved to summarily dismiss him from service and the decision was communicated to him vide a letter dated January 4, 2021.
12. The Petitioner avers that he appealed against his summary dismissal vide a letter dated February 4, 2021.

Particulars of Breach and Violation

13. The Petitioner avers that the Audit conducted in the year 2016 at Migori Law Courts was without the Notice and/or involvement of the Petitioner who was never accorded any hearing and/or opportunity to address any audit query as by law and principles of Natural Justice required.
14. The Petitioner was but only notified of the alleged irregularity in 2019 long after he had been transferred to another station.
15. The Respondent Assistant Director Finance in charge of South Nyanza Mr Jonathan Langi advised the Petitioner to simply settle the deposit in respect of the altered receipt and he would be absolved which advise the Petitioner innocently believed just to be shocked to be adversely affected on advise given by the Employer a matter which confirms bad faith and trickery in the advise.
16. The Petitioner seeks the following reliefs:
 - i. A declaration that the Petitioner is entitled to protection under the Provisions of the Constitution 2010 and the Fair Administration Actions Act.
 - ii. A declaration that Summary Dismissal of the Petitioner from his Employment vide letter dated January 4, 2021, is unconstitutional, unlawful and amounts to violation of the aforesaid Provisions of the Constitution and status enumerated in the Petition herein.



- iii. An order of Certiorari to issue to bring into this Honourable Court for purposes of being quashed the decision of the Respondent summarily dismissing the Petitioner vide letter dated January 4, 2021.
- iv. An order Reinstating the Petitioner in his positions of Accountant I as stated in the Petition herein.
- v. A permanent injunction prohibiting and retraining the Respondent either by themselves, Servants, Agents or otherwise howsoever from appointing any other person to act and/or replace the Petitioner in his position.
- vi. Compensation.
- vii. Respondents be condemned to pay damages for unfair and illegal dismissal.
- viii. Respondents be ordered to supply the Petitioner with the minutes and recommendations of its disciplinary Committee meeting held on September 1, 2020.
- ix. This Honourable Court be pleased to issue any other Orders as it deems fit and expedient.
- x. Respondent be condemned to pay costs and interest.

The Response

17. The Respondent states that the Petitioner was employed as a Clerical Officer vide a Letter dated August 17, 2001, and later on September 27, 2006, the Petitioner was re-designated to the Position of Accounts Assistant 1.
18. The Respondent states that on February 28, 2013, the Petitioner was promoted to the position of Senior Accounts Assistant, PLS 10, stationed at Migori Law Courts.
19. The Respondent avers that it transferred the Petitioner from Migori Law Courts to Ogembo Law Courts vide a letter dated December 9, 2019, and that pursuant to a new grading and salary structure, designated the Petitioner as Accountant 1, a position he held until his termination on January 4, 2021.
20. The Respondent states that between February 14 and 15, 2019, it conducted an audit on revenue, deposits, procurement and expenditure Management at Migori Law Courts for the period between July, 2016 and June, 2018.
21. It is the Respondent's further assertion that the audit yielded a Report dated February 26, 2020, and which implicated the Petitioner in misappropriation of deposit collections, teaming and lading using deposit funds and loss of audit trail over deposit collections and banking, which the Petitioner blamed on duplicate receipt books.
22. The Respondent states that faced with the findings of the Audit Report, the Petitioner took responsibility by resorting to make good the loss attributable to the alteration of the said duplicate receipt books by paying Kshs 70,375.00 into the Migori Revenue Account.
23. The Respondent states that on July 7, 2020, the Petitioner responded to the notice to show cause, wherein he admitted that he worked at Migori Law Courts during the period under the audit save that the alterations occurred while he was on leave, but nevertheless, he took responsibility and paid up the lost revenue ostensibly in the spirit of accountability.
24. The Respondent further avers that on August 11, 2020, the Petitioner was invited to a disciplinary hearing, to be held on September 1, 2020, and that upon hearing the Petitioner, the Respondent's



Human Resource Management Advisory Committee deliberated on the matter and recommended that the Petitioner be absolved of all the charges, be given the benefit of doubt, and his suspension lifted with full pay.

25. The Respondent states that the recommendation of the JSC Human Resource Management Advisory Committee (JSC – HRMAC) was presented before the JSC Human Resource Management Committee (JSC – HRM) on December 7, 2020, for consideration. The Respondent further states that upon consideration and review of the documentation and the evidence on record, the JSC – HRM arrived at a different conclusion and recommended that the Petitioner be dismissed with effect from June 26, 2020, on account of gross misconduct.
26. The Respondent states that the Petitioner was informed of his right of appeal and that his appeal was considered at a meeting held on June 24, 2021, and that the appeal was dismissed on grounds of insufficient grounds.

Analysis and Determination.

27. I have carefully considered the pleadings herein and the rival submissions. The following issues arise for determination:
 - a. Whether the Respondent violated the Petitioner’s rights under Articles 2 (1), 10(2), 22(10), 23(1), 27, 41 and 47(1), 50 (1), 75, 175, 236 and 259 of the Constitution.
 - b. Whether the Petitioner is entitled to the remedies sought

Whether the Respondent violated the Petitioner’s rights under Articles 2 (1), 10(2), 22(10), 23(1), 27, 41 and 47(1), 50 (1), 75, 175, 236 and 259 of the Constitution.

28. The instant suit though framed as a Constitutional petition, raises issues that fall squarely, and that could have been dealt with better if brought in the form of a normal employment cause under the Employment Act.
29. The petition arises from the decision of the Respondent to summarily dismiss the Petitioner from service on account of gross misconduct. The Petitioner contends that by its decision, the Respondent violated his Constitutional rights Articles 2 (1), 10(2), 22(10), 23(1), 27, 41 and 47(1), 50 (1), 75, 175, 236 and 259.
30. The Petitioner’s case is that he was not notified nor heard or in any way asked to respond to audit queries raised in the audit report. The Petitioner further contends that he paid the amount of the altered receipts based on the advice of the Respondent’s Assistant Director for Finance, and for the payment to be held against him is an unfair labour practice.
31. The Petitioner further asserts that the audit subject of his dismissal was unfairly conducted. It is his submission that the Respondent disregarded the constitution, the Fair Administrative Actions Act and the Employment Act by acting in an arbitrary and whimsical manner.
32. The Petitioner’s was evidently issued with a show cause letter, he responded to the show cause letter and was later invited for a disciplinary hearing before the Respondent’s advisory committee.
33. The committee made its recommendation to the Human Resource committee of the Respondent who resolved to summarily dismiss the petitioner.
34. In my view the steps taken by the Respondent prior to, and upon its decision to summarily dismiss the Petitioner, meets the threshold set under Article 47, Section 4(4) of the Fair Administrative Actions



Act and Section 41 of the Employment Act. In Hosea Akunga Ombwori v Bidco Oil Refineries Limited (2017) eKLR the Court stated:

“To satisfy the requirements of Section 41 of the Employment Act, 2007, an employer issues what is called in ordinary parlance a show cause notice/letter. Such a letter or notice should outline the allegations or charges against the employee and also request him to respond within a reasonable time. The notice also ought to inform the employee that disciplinary action which might lead to termination of employment is under consideration. In other words, the notice should be set out in clear terms”.

35. The Respondent’s audit exercise was in relation to the Petitioner’s work and to require him to get involved in the audit, would have undermined the entire process. It was not a requirement of any law that the Petitioner is heard in the cause of the audit. Further, the Petitioner was allowed opportunity to clarify and/or state his case in relation to the issues subject of the audit report and cannot therefore be heard to say that he was condemned unheard.
36. In the Nigerian Supreme Court decision in BA Imonikhe v Unity Bank PLC SC 68 of 2001 it was held:

“Accusing an employee of misconduct, etc by way of a query and allowing the employee to answer the query, and the employee answers it before a decision is taken satisfies the requirement of fair hearing or natural justice. The appellant was given a fair hearing since he answered the queries before he was dismissed.”
37. A look at the Petitioner’s petition and the evidence before court does not reveal any form of constitutional violations. Further, even if the case was lodged as a normal cause under the employment Act, both the procedure adopted in dismissing the Petitioner and the reasons for the dismissal, justify the Respondent’s decision to summarily dismiss the Petitioner.
38. I find and hold that the petition does not prove any violations of the Petitioner’s rights under the constitution or any other law. The petition lacks merit and is hereby dismissed.

Whether the Petitioner is entitled to the remedies sought

39. The Petitioner sought a declaration that he is entitled to protection under the Constitution and the Fair Administration Actions Act, a declaration that his summary dismissal is unconstitutional, unlawful and amounts to violation of the Constitution amongst other reliefs.
40. The remedies sought herein are only tenable upon a finding of violation of the Petitioner’s constitutional rights.
41. The court having found that no rights were violated, means no remedies will issue. The Petition is dismissed in its entirety.
42. In conclusion, the court finds and holds that the petition herein lacks merit, and is hereby dismissed in its entirety.
43. Each party shall bear their own costs of the petition.
44. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 28TH DAY OF JULY, 2022.

CHRISTINE N BAARI



JUDGE

Appearance

Mr Kisera Present for the Petitioner

Ms Kisiah h/b for Mr. Mwangi for the Respondent

Christine Omollo- C/A

