



**Obuya v Officer In- Charge Homa Bay Main Prison & 2 others (Employment and Labour Relations Petition E014 of 2021) [2022] KEELRC 12697 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12697 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**EMPLOYMENT AND LABOUR RELATIONS PETITION E014 OF 2021**  
**CN BAARI, J**  
**SEPTEMBER 29, 2022**  
**N THE MATTER OF ARTICLES 47, 50 AND 236 OF THE CONSTITUTION OF KENYA**  
**AND**  
**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS**  
**AND FREEDOMS UNDER ARTICLES 10(1) (A), 9B0, (C) & 2 (A), (B), 20, 21, 24,**  
**27, 28, 29(1), 31 (A) AND (B), 47 AND 236 OF THE CONSTITUTION OF KENYA**  
**AND**  
**IN THE MATTER OF ALLEGED CONTRAVENTION OF SECTION**  
**4(1) (2) & (3) OF FAIR ADMINISTRATIVE ACTION ACT AND**  
**SECTION 69 OF THE PUBLIC SERVICE COMMISSION ACT OF 2017**

**BETWEEN**

**RASTO OBUYA ..... PETITIONER**

**AND**

**OFFICER IN- CHARGE HOMA BAY MAIN PRISON ..... 1<sup>ST</sup> RESPONDENT**

**COMMISSIONER GENERAL OF PRISONS ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. Mr Rasto Obuya, the petitioner herein, *vide* a petition dated February 12, 2021, and amended on February 17, 2022 and filed in court on February 23, 2022, sought the following reliefs: -
  - a. A declaration that the purported summary interdiction and charge without a hearing offended the strict and mandatory rules of natural justice, section 69 of the [Public Service Commission](#)



Act, articles 35, article 41, article 47 of the Constitution as read with section 4(1), (2) and (3) of the Fair Administrative Action Act and article 236 of the Constitution and was therefore illegal, *ultra vires*, unprocedural, unfair and unconstitutional null and void *ab initio* and are hereby condemned, revoked, quashed and or set aside and the consequent proceedings and determinations founded on interdiction and charge suffer the same fate and the petitioner be reinstated to his duties.

- b. That the impugned charge was void, defective, *ultra vires* and a nullity for none conformity to the strict mandatory statutory requirement as laid down under the Fair Administrative Actions Act, being without an accompanying statement therefore the same is unconstitutional, *ultra vires*, null and void and hence all consequent proceedings and determination were a non- stator and without foundation and are hereby set aside.
- c. A declaration that the proceedings as conducted by the respondents were procedurally unfair as the 1<sup>st</sup> and 2<sup>nd</sup> respondents decided to overlook the well laid principles of natural justice and confirmed under article 47 and 236 of the Constitution and section 4(1) (2) (3) and (6) of the Fair Administrative Actions Act, hence the proceedings and consequent determination were unconstitutional, *ultra vires*, null and void *ab initio* and are hereby condemned revoked, quashed and or set aside.
- d. A declaration that the respondent's actions jointly and severally were in gross abuse of the national values principles under article 10(2)(b) and chapter 6 of the Constitution. Principles of public service under article 232 and principles of natural justice and therefore unconstitutional and a nullity.
- e. A declaration that the respondent and its agents violated the petitioner's right to work as envisaged under article 23(1) (2) (3) of the Universal Declaration of Human Rights and his constitutional right to fair labour practices under article 41 of the Constitution of Kenya.
- f. A declaration that the respondents jointly and severally breached the constitutional rights and freedoms of the petitioner under article 27(1), 28 and 29(d) and (f), 35, 41, 47 and article 236 (a) & (b). The petitioner be compensated a sum of Kshs 10,000,000.00 and or whatever sum the honourable court may deem just and reasonable to award.
- g. A declaration that under article 236 of the Constitution the petitioner is still the legitimate and lawful holder and remains a legitimate and lawful holder of his position as a prison warder and a mandatory injunction do issue against the respondent to unconditionally reinstate and deploy him with effect from the date of the judgment to his service without any break and loss of salary, benefits and privileges in a similar or equivalent rank/capacity within prisons.
- h. That the honourable court issue an order directing the release and payment of the petitioner's accrued back salaries and arrears as a lump sum forthwith, and with interest as at times of the accrual from august, 2019 until full payment and a mention date be given to confirm full compliance of the court orders.
- i. The respondents be condemned to pay costs and interest incidental to these proceedings.
- j. A declaration that the respondents jointly and severally breached provisions of section K.3 of the human resource policies and procedures for public service of 2016 by dealing with the petitioner's matter/disciplinary case for over 18 months without any justifiable reason.
- k. A declaration that the respondents jointly and severally breached provisions of section K.4 & K.5 of the human resource policies and procedures for public service of 2016 as the petitioner



was never supplied with the statements of alleged misconduct and given a chance to the same as required by law.

- i. A declaration that the respondent pay to the petitioner the accrued salary of Kshs 45,600.00 thus  $\frac{1}{2}$  of 45,600=23,700 x 18 months (the period for interdiction) =Kshs462,600.00
2. The petition was supported by the grounds inter alia:
- i. That the petitioner was employed by the respondents on the May 17, 2010 as a prisoner warder of PF No 20100645569, and was confirmed on July 19, 2012, on permanent and pensionable terms of service.
  - ii. The petitioner was then posted at Meru main prison, Kakamega main prison, Sukusa farm, Kisumu medium, Kisumu maximum and thereafter to Homa-Bay main prison.
  - iii. That the petitioner has served as a prison warder for a period of 10 years and seven months and has performed his duties with utmost faith, fidelity to the law and diligence without any conduct of misbehavior.
  - iv. That on June 28, 2019, he was served with orderly room proceedings and summons to appear before the officer in charge of Homa-Bay prison on July 2, 2019.
  - v. That the petitioner appeared before the officer in charge of Homa-Bay main prison on the said July 2, 2019 at 0900hrs where he was asked to surrender his mobile phone before the proceedings started. The petitioner declined to surrender the the phone as he was not given the grounds upon which the mobile phone was being taken from him. The officer in charge then called off the proceedings to another date which was to be communicated to the petitioner.
  - vi. The petitioner was then called by the officer in charge on July 9, 2019 informing him that, he was required to interdict the petitioner and to institute disciplinary proceedings against him.
  - vii. The petitioner received an interdiction letter stating that on the July 2, 2019, while being presented for orderly room proceedings, he entered with a mobile phone inside the prison and became violent upon order to surrender. He was dispossessed of his duties as a prison warder.
  - viii. The petitioner then wrote a letter on the July 12, 2019 to the secretary public service commission Nairobi complaining about the unprocedural and illegal interdiction by the 1<sup>st</sup> respondent. The commission then responded on July 19, 2019, promising to inform the petitioner of the outcome and to date the petitioner has not received any further communication from the secretary public service commission.
  - ix. That on the September 12, 2019, the 1<sup>st</sup> respondent sent a summon to the petitioner ordering him to appear in orderly room on the September 16, 2019 at 10.00am before the officer in charge to answer the counts committed against him.
  - x. That the petitioner appeared before the officer in charge Homa-Bay main prison on September 16, 2019, and on other occasions but on all these instances, he was informed that there will be no proceedings as the same had been postponed for various reasons.
  - xi. The petitioner states that he received a notice to show cause on September 9, 2019 dated July 14, 2020, informing the petitioner that he was charged on January 7, 2020 with offences of making unauthorized communication concerning the prison. The petitioner further states that he was not served with any summons to appear on the date.



- xii. The petitioner states that he responded to the notice to show cause on September 10, 2020, through the Officer in-charge and forwarded a copy to 2<sup>nd</sup> respondent.
  - xiii. The petitioner avers that he made efforts to see the 2<sup>nd</sup> respondent who visited Homa-Bay main prison on the December 20, 2019, but his efforts were thwarted by the 1<sup>st</sup> respondent who directed the petitioner to discuss the matter with the regional commander of prisons Nyanza region.
  - xiv. It is the petitioner's case that he wrote letters complaining of his lengthy interdiction that lasted from July 9, 2019 to December 7, 2020 when he was dismissed.
  - xv. The petitioner states that he received a certificate of dismissal from Kenya Prison Service on the December 7, 2020 indicating the cause of discharge as gross misconduct and poor record of service.
  - xvi. It is the petitioner's case that he had never been given a chance to respond to the charges laid against him nor plead the same before an independent body duly constituted as required by law.
3. The petition is premised on articles 10, 35, 41, 47 and 236 of the Constitution, section 69 of the Public Service Commission Act, 2017 and sections 4(1), (2) and (3) of the Fair Administrative Actions Act.
  4. The respondents replied to the petition *vide* a replying affidavit sworn by one Robert N. Basigwa on July 21, 2021. The respondents' opposed the petition on the following grounds:
    - i. That the respondents do not dispute that the petitioner was their employee (prison warder). They deny that the summary interdiction was tainted with illegality, procedural impropriety, and violation of rights
    - ii. The respondents state that the petitioner is not entitled to the reliefs sought.
    - iii. The respondents states that prior to the petitioner's dismissal, he was issued with three show cause letters. The respondents further states that the petitioner was first subjected to disciplinary action on September 12, 2016, where he was charged with posting demeaning and derogatory content in the prisons' fan page, resulting in a fine of Kshs 4000 and a severe reprimand.
    - iv. The respondents state that the petitioner continued posting information concerning the prison to unknown persons on social media in violation of the prisons standing orders.
    - v. The respondents aver that during a visit to Homabay main prison by the Commissioner General of Prisons on December 20, 2019, the petitioner caused commotion while dressed in civilian clothing insisting on joining the other officers who were former-up and in uniform.
    - vi. It is the respondents case that the Commissioner General of Prisons ordered the petitioner to excuse himself from the parade for being dressed in civilian clothes, but that he blatantly disobeyed the orders and stayed through the parade.
    - vii. The respondents states that the petitioner defied lawful instructions to hand over his mobile phone during the orderly room proceedings leading to the adjournment of the proceedings. It is the respondents' position that the petitioner was served with six (6) summons to appear for hearing, but that he became uncooperative resulting in the proceedings being held in his absence pursuant to the prisons standing orders.



- viii. The respondents states that the petitioner was dismissed from the service for insubordination.
5. Parties canvassed the petition through written submissions.

### **The Petitioner's Submissions**

6. It is submitted that the petitioner exercised his liberty and filed an employment petition, not a constitutional petition as alleged by the respondents. It is further submitted that he cannot be faulted by the respondent for exercising his liberty as provided by the law.
7. The petitioner submits that the respondents in dealing with the petitioner before dismissing him from the service were under a legal obligation to apply the national values and principles of governance. It is submitted that the respondents did not accord the petitioner the opportunity to enjoy his rights.
8. It is submitted for the petitioner that he was not given prior and adequate notice of the nature of the proposed administrative action and neither was he given an opportunity to be heard. He sought to rely in *County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others* (2015) eKLR to support this position.
9. It is submitted that the charges levelled against the petitioner were patently incompetent in form and incurably defective, invalid, void and in want of specificity of particulars.

### **The Respondents' Submissions**

10. It is submitted for the respondents that the petitioner has failed to prove the alleged violation of his constitutional rights, whose threshold for such a claim is clarity and precision. They sought to rely on the holding in *Anarita Karimi Njeru v Republic* (1979)eKLR.
11. The respondents further submit that the petitioner's claim framed as a constitutional petition is premature and an abuse of the court process. The respondents contend that the petitioner was accorded a fair hearing on more than one occasions which either led to a warning, fine or severe reprimand.
12. It is submitted for the respondents that the petitioner was dismissed for valid reasons having on several occasions published unauthorized communication on social media concerning the prison, contrary to rule 124(1) of the *Prison (Prison Council) Rules*. They had reliance in the case of *Jared Aimba Fina Bank Limited* (2016)eKLR to buttress this position.
13. It is the respondents' submission that the petitioner's dismissal did not arise from one single incident, but continuous misconduct, which he committed regardless of the disciplinary action taken against him. It is further submitted that the petitioner received several warnings issued after orderly proceedings, and that dismissal from the service was a measure of last resort taken to maintain the discipline of the Kenya Prisons Force.
14. It is finally submitted for the respondents, that for reason that the petitioner was dismissed on valid reasons, he is not entitled to the reliefs sought.

### **Analysis and Determination**

15. The issues that fall for determination are:
- i. Whether the petitioner's dismissal violated his constitutional rights.
  - ii. Whether the petition as drawn violates the principle of constitutional avoidance



- iii. Whether the petitioner is entitled to the reliefs sought.

**Whether the Petitioner's dismissal violated his Constitutional rights.**

16. The petitioner's contention is that his dismissal from the service of the respondents violated his rights under articles 10, 35, 41, 47 and 236 of the Constitution.
17. The lawfulness of a dismissal such as the one subject of this petition is determined by the adherence by the employer/respondents with the provisions of the Employment Act. Sections 41, 43, 45, 46 and 47 of the Employment Act, 2007, give effect to articles 41 and 47 of the Constitution on fair labour practices and fair administrative action.
18. A determination of whether or not the respondents violated the provisions of the Constitution upon which the petition is premised, depends on whether or not the respondents met both the procedural and the substantive justification tests prior to dismissing the petitioner.
19. The petitioner's case is that he was not at any one time subjected to orderly room proceedings or given a hearing prior his dismissal. Sections 41 of the Employment Act and section 4 (4) of the Fair Administrative Actions Act, obligates an employer to inform an employee in a language the employee understands the reasons for which it is considering dismissal/termination, and allow the employee to be represented by a shop steward or a fellow employee during the hearing.
20. In Hosea Akunga Ombwori v Bidco Oil Refineries Limited (2017) eKLR the court had these to say on section 41:
- “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.”
21. The evidence before court bear a show cause letter requiring the petitioner to show why he should not be subjected to orderly room proceedings for acts of misconduct that are said to amount to a poor record of service.
22. The petitioner has in his evidence admitted responding to the show cause letter *vide* his letter of September 10, 2020. The evidence before court further bears summons inviting the petitioner for orderly room proceedings on various dates, including communication that the orderly room proceedings will proceed in the petitioner's absence for having failed to cooperate with the respondents on the hearing.
23. The petitioner's assertion that he was not given a fair hearing prior to the dismissal, in my view, does not hold as the evidence before court indicates that the respondents allowed the petitioner opportunity to make representation by way of a response to the show cause letter and invitations to attend orderly room proceedings, but which he failed to honour. In BA Imonikhe v Unity Bank PLC S.C 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.”

24. That the petitioner was given opportunity to make representation by way of orderly room proceedings in accordance with the prisons rules, and he failed to appear and/or cooperate, does not make the dismissal unprocedural. The respondents did not have away of making the petitioner attend the hearing other than by him adhering to the summons relating to the proceedings.
25. The second limb in determining fairness and the lawfulness of a dismissal, is the validity and justifiability of the reasons for the dismissal.
26. The respondents’ reasons for dismissing the petitioner per the show cause letter dated July 14, 2020, includes making unauthorized communication concerning prisons contrary to section 124 of the [\*Prisons Rules\*](#).
27. It has also been submitted that the petitioner defied lawful orders from his superiors including those of the Commissioner General of Prisons and participating in a parade dressed in civilian clothing. In [\*Reuben Ikatwa & 17 Others v Commanding Officer British Army Training Unit Kenya & another\*](#) [2017] eKLR the Court of Appeal opined:

“In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable response to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair.....”

28. Further, in [\*Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union\*](#) [2017] eKLR it was held that the court looks into the validity and justifiability of the reasons for termination.
29. The petitioner’s assertion of violation of his constitutional rights under articles 35, 10, 41 and 47 and 236 has not been specifically proved to the required threshold set in the case of [\*Anarita Karimi Njeru v Republic\*](#) (1979) eKLR .
30. I conclude by holding that the petitioner was dismissed for valid reasons and in accordance with fair procedure.

### **Whether the petition as drawn violates the principle of constitutional avoidance**

31. The instant petition herein is premised on a dismissal from the prison’s service. The petitioner’s assertion is that he was dismissed without a hearing and without being informed of the reasons for the dismissal.
32. The issues subject of the petition, are all, without exception, employment issues, that could have been dealt with through a normal cause under the [\*Employment Act\*](#), 2007, and not by way of a constitutional



petition. In the case of Re Application by Bahadur [1986] LRC 297, a case from Trinidad & Tobago, the court held thus:-

“.....The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper cause is to bring the claim under that and not under the Constitution.”

33. Further, in the South African case of SA Naptosa & others v Minister of Education Western Cape & others [2001] BLLR 338 at 395 the court stated:

“...If an employer adopts a labour practice which is thought to be unfair, an aggrieved employee would in the first instance be obliged to seek remedy under the Labour Relations Act. If he or she finds no remedy under the act, the Act might come under scrutiny for not giving adequate protection to a constitutional right...”

34. The Court of Appeal also addressed the principle of constitutional avoidance in Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR where it emphasized thus:

“In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly, invoking the constitutional route in the circumstances of this case was misguided. The Constitution should not be turned into a thoroughfare for resolution of every kind of common grievance.”

35. In light of the foregoing decisions of superior courts, I find and hold that the petition herein offends the principle of constitutional avoidance.

36. In conclusion, the court finds and holds that the petition herein lacks merit, and is hereby dismissed in its entirety.

37. The petitioner shall bear the costs of the petition.

38. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Mr. Nyegenye present for the Petitioner

Ms. Kimberly h/b for Ms. Essendi for the Respondents

Christine Omollo- C/A

