



**Wako v Ministry of Interior and Coordination of National Government  
(Directorate of Immigration and Registration of Persons & 2 others (Petition  
E006 of 2021) [2022] KEELRC 4133 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4133 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU**

**PETITION E006 OF 2021**

**DKN MARETE, J**

**SEPTEMBER 28, 2022**

**IN THE MATTER OF ARTICLES 19, 20, 21 AND 22 (1) OF THE CONSTITUTION  
OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL  
FREEDOMS UNDER ARTICLES; 41(1), 47(1) & (2) AND 50 OF THE  
CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 10, 232 AND 236  
OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS  
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF THE CONTRAVENTION OF SECTION 4 OF THE FAIR  
ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF SECTIONS 41, 43, 44, 45, 49 AND 50 OF THE EMPLOYMENT  
ACT, 2007**



**BETWEEN**

**RASHID IRIBO WAKO ..... PETITIONER**

**AND**

**MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL  
GOVERNMENT (DIRECTORATE OF IMMIGRATION AND REGISTRATION  
OF PERSONS ..... 1<sup>ST</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

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

**JUDGMENT**

1. This matter was originated by way of a constitutional petition dated 30th July, 2021.
2. The respondent in their grounds of opposition dated 27th October, 2021 deem the petitionas frivolous and vexatious and prays that the same be dismissed with costs.
3. The petitioner invokes the following provisions of the *Constitution* as the basis of his case;Article 41(1) – the right to fair labor practices.Article 47(1) and (2) of the Constitution on fair administrative action.Article 236-Protection of public officer.Section 41- *Employment Act* andSection 4 (1) (2) (3) and (4) of the *Fair Administrative Action Act* which provides as such.
4. The petitioner’s further case is that on 1st February, 2007, he joined the public service on employment and worked for the 1st respondent. On 1st September, 2014, he was promoted to senior clerical officer.
5. His other case comes out as follows;
  12. The petitioner was later deployed to the department of civil registration (births and deaths) within Isiolo County, where he served faithfully as a cashier until the date he was illegally and unfairly terminated from employment.
  13. In his employment as a cashier, the petitioner was tasked with the following roles: revenue collection; keeping books of accounts; banking and reconciliation.
  14. On or about mid June 2015, the petitioner was invited by CID officers for questioning over an alleged making of a document without authority on an application form made for the registration of a birth certificate to the 1st respondent’s department of civil registration.
  15. During the interrogation, the petitioner explained to the CID officers that he was employed as a cashier and that he does not have anything to do with the application for registration. The petitioner also explained that the application form was a general form which can be obtained by anybody, filled and taken to 1st respondent’s department of civil registration for processing and approval. The petitioner further explained to the CID officers that he had not signed the application forms and that the forms had not been processed or approved by the 1st respondent.
  16. In a shocking turn of events, the CID officers, who had a pre-determined notion that a forgery had been committed, caused the petitioner to be arrested and charged with the offence of



making a document without authority contrary to section 357(a) of the Penal Code in Isiolo Chief Magistrate Criminal Case No 306/2015.

17. Upon being released on Bond, the petitioner resumed his normal employment duties when he realized at the end of August 2015 that his salary had been illegally deducted, by the 1st respondent, whereby he was receiving half a basic salary and house allowance only.
18. On or about 16/10/2015, the petitioner received a letter of interdiction dated 24/09/2015 from the 1st respondent. Under the letter, the petitioner was interdicted from performing his duties as public officer on the basis that he had been charged with an offence under the provisions of the Penal Code. The letter also required the petitioner to file a response within twenty one (21) days before he could be terminated from employment.
21. On 14/2/2018 the criminal charges against the petitioner in Isiolo Chief Magistrate Criminal Case No 306/2015 were withdrawn and the petitioner was discharged from any criminal liability over the alleged forgery.
27. Via a letter dated 12th April 2019, the 2nd respondent wrote to the petitioner acknowledging that it had received his appeal against dismissal from service.
28. On 26/02/2020 the petitioner received a letter dated 17/02/2020 from the 1st respondent informing him that his appeal had been disallowed by the 2nd respondent. The letter also informed the petitioner of his right to apply for review to the 2nd respondent, within six (6) months.
29. Via a letter dated 28/2/2020, the petitioner wrote to the 2nd respondent applying for a review of its decision which disallowed his appeal against the dismissal from service.
30. On 5/5/2021 the petitioner received a letter dated 30/4/2021 from the 1st respondent informing him that the 2nd respondent had disallowed his application for review. The 1st respondent also informed the petitioner that his case had now been marked as closed.
33. The petitioner avers that the 1st and 2nd respondents acted in contravention of section 41 of the Employment Act which requires that before dismissing an employee for misconduct, the employer shall explain the reasons to the employee in the presence of another employee of his choice and thereafter accord the employee and his companion a chance to air their defence which must be considered before the dismissal is determined.
34. The petitioner avers that the actions and decisions of the 1st and 2nd respondents offended the provisions of section 4 (1) (2) (3) & (4) of the Fair Administrative Action, to wit;
  - a. After responding to the letter of interdiction on 19/10/2015, the petitioner was informed, by the 1st respondent, about his dismissal from the service on 1st March 2019. The petitioner avers that this delay of three years and five months by the 1st respondent was not expeditious or efficient as required by the law, thus offending the provisions of section 4 (1).
  - b. Additionally, after lodging his appeal against the dismissal on 27/03/2019 the petitioner was notified that his appeal had been disallowed by the 2nd respondent on 17/02/2020. The petitioner further avers that 2nd respondent's delay of eleven months was not expeditious or efficient as required by the law, thus offending the provisions of section 4(1).



- c. Also, after applying for review within time on 28/02/2020, the petitioner was notified that his application for review had been disallowed by the 2nd respondent on 30/04/2021. The petitioner further avers that 2nd respondent's delay of fourteen months was not expeditious or efficient as required by the law, thus offending the provisions of section 4(1).
- d. The decision to dismiss the petitioner from the service was unlawful, unreasonable, un-procedural and unfair since the petitioner was not granted an opportunity to be heard and to make representations as guaranteed by the law.
- e. The decision to dismiss the petitioner from the service was unlawful and unfair since the 1st and 2nd respondents did not give any reasons to support their decisions.
- f. The decision to dismiss the petitioner from the service was unlawful and unfair since the 1st and 2nd respondents did not supply any relevant information, materials and evidence that they relied upon in making their decisions.

6. He prays thus;

1. A declaration that the decisions of the 1st and 2nd respondents dismissing the petitioner from service are unconstitutional and amounted to an unfair and wrongful termination from employment.
  2. An order does issue to quash, invalidate and nullify the 1st and 2nd respondents' decisions of dismissing the petitioner from the service.
  3. An order does issue reinstating the petitioner back to his job and posting and for petitioner to continue serving as a public servant with all the benefits entitled to his position.
  4. An order compelling the respondents to pay all salaries of the petitioner which were withheld by the respondents from August, 2015 until the date of judgment, re-instatement and posting.
  5. An award of general damages to the petitioner for all the losses he has suffered, mental anguish and opportunities he has missed as a result of his unlawful dismissal.
  6. Costs of this petition and interest on all heads of awards at court rates from the date of filing this petition until the date of full payment.
  7. Such further and consequential orders as this honourable court may deem fit to make.
7. The respondents state their case per the grounds of opposition and basically avers that the petition does not meet the threshold of a constitutional petition as per the authority of *Anarita Karimi Njeru v Republic* (1979) eKLR.
8. The issues for determination therefore are;
1. Whether this matter meets the threshold of a constitutional petition per *Anarita Karimi Njeru v Republic*.
  2. Whether the termination of the employment of the claimant by the respondents was wrongful, unfair and unlawful.
  3. Whether the claimant is entitled to the reliefs sought.
  4. Who bears the costs of the case.



9. They (respondents) seek to rely on section 45 (4) & (5) which provides thus;
- (4) A termination of employment shall be unfair for the purposes of this Part where-
- a. The termination is for one of the reasons specified in section 46; or
  - b. It is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the industrial court shall consider-
- a. The procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
  - b. The conduct and capability of the employee up to the date of termination;
  - c. The extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
  - d. The previous practice of the employer in dealing with the type of circumstances which led to the termination; and (e) the existence of any previous warning letters issued to the employee.
10. The respondents further seek to buttress their case by relying on the authority of *National Bank of Kenya v Samuel Nguru Mutonya* (2019) eKLR adopted the position in *Janet Nyandiko versus Kenya Commercial Bank Limited* (2017) eKLR, where the court held thus;

“Section 45 of the act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee I deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee’s conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.

Section 41 of the act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee’s employment with



them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegation leveled against him by the employer.”

11. Further, in the authority of *Paramount Bank Limited v Vaqvi Syed Qamara & Another* (2017) eKLR, where the court observed thus;

Irrespective of the gravity of the misconduct alleged against an employee, his or her dismissal must confirm to the provisions of section 41(2) of the *Employment Act* which requires that;

...an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

The appellant did not afford the 1st respondent an opportunity to be heard as required by section 41(2) of the *Employment Act*. He ought to have been given an opportunity to be heard before termination of his employment. He may have offered an explanation on the theft.

12. Again,

21. Section 44 (4) of the *Employment Act*, 2007 in particular section 44, (4) (g) provides as follows;

“Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for a lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if-

- a. Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;
- b. During working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;
- g. An employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offense against or to the substantial detriment of his employer or his employer’s property.”

13. Further,

14. In the case of *Thomas Sila Nzivo v Bamburi Cement Limited* (2014) eKLR, the court observed thus;

“The respondent had reasonable and sufficient grounds to suspect the claimant of having acted to the substantial detriment of the respondent and its property and was justified in summarily dismissing the claimant under section 44 (4) (g) of the *Employment Act*, 2007.



The employer was not required to have conclusive proof of the claimant's involvement; it was only expected to have reasonable and sufficient grounds."

15. In *Kenya Revenue Authority v Rewel Waitbaka Gitabi & 2 Others* (2019) eKLR the court emphasized that the standard of proof is on a balance of probability, not beyond reasonable doubt. It urged that the test was partly subjective. Further, it maintained that all an employer is required to prove are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services.

16. Moreover, the court in *Kenya Revenue Authority v Rewel Waitbaka Gitabi & 2 others* (supra) relied on the guidelines found in *Halsbury's Laws of England*, 4th Edition, Vol 16 (1B) para 642 which stated thus;

"...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 responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonable 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 the dismissal falls outside the band, it is unfair."

29. As such, our humble submission is that the petitioner's impugned actions were criminal in nature as evidenced by his arrest and charge. We further contend that said actions were detrimental to the respondent's function as they call into question the documents emanating from their offices. Consequently, the aforementioned actions fall squarely within the four corners of section 44 (4) (g) and thus warranted the petitioner's dismissal.

17. The claimant was accused of making a document without authority on an application form meant for registration of a birth certificate to the 1st respondent's department of civil registration contrary to section 357 of the *Penal Code*. He was charged but discharged under section 87(a) of the *Penal Code*. He therefore deems himself innocent.

18. The respondents counters this by submitting that the petition does not meet the threshold of a constitutional petition as set out in the Anarita Karimi Njeru authority. It is their further case that the petitioner does not disclose a reasonable cause of action against the respondent in that he was dismissed for good cause and in tandem with section 44(4)(g) of the *Employment Act*.

19. Again, bearing in mind the disputed facts of the claimant having been charged in court and having been discharged under section 87(a) of the *Civil Procedure Code* for failure of co-operation of the witnesses for the state, his termination from employment was sustainable.

20. This matter does not meet the constitutional threshold of a constitutional petition. The petitioner falls short of illustrating constitutional breaches inflicted on him in the course of his termination of employment. The various references to breach only come out as references. There is no tangible evidence or tying factors of these to the circumstances and particulars of his case.

21. Again, the dismissal of the claimant from employment was based on sound grounds. This is his overt misconduct of making or forging a document relating to a registration of birth. This is by all means



gross misconduct which warranted a termination of employment. I therefore find a case of lawful termination of employment and hold as such. This answers the 1st and 2nd issue for determination.

22. The 3rd issue for determination is whether the petitioner is entitled to the reliefs sought. He is not. Having lost on a case of unlawful termination of employment, he becomes disentitled to the reliefs sought.
23. Again, the claimant brings out a case or claim coaxed as a constitutional petition. This has been faulted and dismissed for all it is worth. The petitioner therefore has no matter before this court and is not deserving of any relief.
24. I am therefore inclined to strike out the petition and dismiss the claim with orders that each party bears their costs of the same.

**DATED AND DELIVERED AT NYERI THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**D.K.Njagi Marete**

**JUDGE**

**Appearances**

1. Mr. Kariuki instructed by Ms. Mithega Kariuki & Company Advocates for the Petitioner.
2. Miss. Kendi instructed by State Law Office for the Respondent.

