



**Were v Ministry of Lands and Physical Planning & another (Petition
E001 of 2021) [2022] KEELRC 3994 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3994 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
PETITION E001 OF 2021**

JW KELI, J

SEPTEMBER 22, 2022

**IN THE MATTER OF: ARTICLES 10, 19, 20, 21, 22, 23, 41,
47 AND 236 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF : ALLEGED CONTRAVENTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 19, 20, 21,
22, 23, 2841, 47 AND 236 OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF THE EMPLOYMENT ACT 2007

BETWEEN

SILVANUS LUKOKO WERE PETITIONER

AND

MINISTRY OF LANDS AND PHYSICAL PLANNING 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. The Petitioner vide Petition dated April 7, 2021 and received in court on the April 15, 2021 sought the following reliefs:-
 - a. That a declaration be issued that the Petitioner's enjoyment of rights and fundamental freedoms secured in the Bill of Rights under Articles 41,47 and 236 of *the Constitution* have been threatened and infringed by the 1st Respondent by failing , neglecting and /or refusing to give the Petitioner a hearing before an adverse administrative process of demotion and reduction of his salary was made.



- b. That the 1st Respondent violated the Petitioner's right as a public officer to the due protection from demotion and reduction of salary without due process of law as envisaged by Article 236 of *the Constitution*.
 - c. That the Petitioner's salary of Kshs. 65,770/- be restated and the same be used in calculating the Petitioner's retirement benefits.
 - d. That an order for exemplary and punitive damages be and is hereby issued against the 1st Respondent on account of their gross violation of the Petitioner's fundamental freedoms and rights as enumerated in the Petition.
 - e. The 1st Respondent be and is hereby directed to bear the costs of this petition.
 - f. That this Honourable court be pleased to grant such further orders, directions and declaration that serve the cause of justice.
2. The Petitioner filed supporting affidavit annexing exhibits marked as "SLW1" (copy of scheme of service), "SLW 2a,b,c and d" (copies of appointment and promotion letters), "SLW3" (copy of retirement letter), "SLW4" (copy of November, 2020 payslip) "SLW5" (copy of January 2021 payslip), "SLW6" (letter to employer by Advocate), "SLW7" a (February 2021 payslip) and b (March 2021 payslip) which affidavit is sworn by Silvanus Lukoko Were (the Petitioner) on the April 12, 2021 received in court on the 15th April 2021.
 3. The Petition is opposed. The Respondents filed a replying affidavit annexing exhibits "JWN1" (Letter to the Hon Attorney General Office at Kakamega by the 1st Respondent), "JWN2" (letter dated June 21, 2021 by employer to petitioner), "JWN3" (a and b) being copies of the IPPD data capture sheet- staff register and salary progression register) which affidavit is sworn by John W. Njogu sworn on the March 29, 2022 and received in court on the March 30, 2022.
 4. The Petitioner, with the leave of the court filed a further affidavit annexing further exhibit "SLW1" (being payslip) "SLW1" (June 2021 payslip) which affidavit is sworn by Silvanus Lukoko Were (the Petitioner) on the April 28, 2022 and received in court on the May 5, 2022.
 5. On the November 18, 2021 the parties requested the court for time to attempt out of court settlement which time was granted for a period of 60 days. On the February 2, 2022 the parties reported to court that they had failed to agree.
 6. The Petition was canvassed by way of written submissions. The Petitioner's written submissions drawn by M/S Were Lukoko & Company Advocates are dated April 28, 2022 and received in court on the May 5, 2022.
 7. The 1st Respondent's written submissions drawn by Gilbert C. Tarus, Senior State Counsel, are dated June 15, 2022 and received in court on the June 16, 2022.

Determination

8. The Petitioner in his written submissions identified the following issues for determination:-
 - a. Whether the petitioner is a public officer.
 - b. Whether the 1st Respondent violated the Petitioner's rights under *the Constitution* and statutes.
 - c. Whether the Petitioner is entitled to the reliefs sought.



9. The Respondents' in their written submissions identified the following as the issues for determination:-
 - a. Whether the Respondents violated the Petitioner's rights under the Constitution of Kenya, 2010.
 - b. Whether the Petitioner is entitled to exemplary and punitive damages.
10. The court having considered the submissions and pleadings filed herein it is of the considered opinion that the issues before it for determination are as follows:-
 - a. Whether the Respondents violated the Petitioner's rights under the Constitution of Kenya, 2010.
 - b. Whether the Petitioner is entitled to the reliefs sought

Whether the Respondents violated the Petitioner's rights under the Constitution of Kenya, 2010.

11. The Petitioner seeks a declaration to be issued that the petitioner's enjoyment of rights and fundamental freedoms secured in the Bill of Rights under Articles 41,47 and 236 of *the Constitution* have been threatened and infringed by the 1st Respondent by failing , neglecting and /or refusing to give the Petitioner a hearing before an adverse administrative process of demotion and reduction of his salary was made and that the 1st Respondent violated the Petitioner's right as a public officer to the due protection from demotion and reduction of salary without due process of law as envisaged by Article 236 of *the Constitution*.
12. The Petitioner submits that he is a public officer having been appointed by the 1st Respondent pursuant to section 7(4) of the Registered *Land Act* (Cap 300)(Repealed) (annexture SLW2a is the letter of appointment dated 8th August 1995).
13. The Petitioner submits that he worked for the 1st Respondent for 38 years wherein he served diligently with responsibilities and received transfers and promotions (annexture SLW2a,b and c).
14. That the 1st Respondent on the March 10, 2020 issued the Petitioner with retirement letter informing him that they would retire on the July 1, 2021.
15. The Petitioner submits that he continued to serve drawing a gross salary in the sum of Kshs. 65,770/- until December 2020. That on or about January 30, 2021 the Petitioner generated his payslip and found he had been demoted from a Senior Assistant Land Registrar to Chief Clerical officer and further his gross salary reduced from Kshs. 65,770/- to Kshs. 51,060/-.
16. The Petitioner submits that the 1st Respondent is not candid in its defence that it abolished the office held by the Petitioner and designated him to Principal clerical officer (JWN2). That said letter informs the Petitioner that his position has been abolished with effect from September 2, 2020 whereas as at November 2020 the Petitioner was still holding the position of Senior Assistant Land registrar (SLW4). That the letter dated June 21, 2021 done 9 days after filing of the petition was meant to defeat the claim and even then the payslips held by the Petitioner contradicts the contents of the said letter(JWN2).
17. That the last payslip held by the Petitioner before date of retire of June 30, 2021 provides for the position of the Chief Clerical Officer under Job group J and drawing a gross salary of Kshs. 51,060/- as per annexture "SLW1" under the further affidavit.
18. That both the letter dated June 21, 2021 and the Petitioner's payslip for June 2021 originates from the 1st Respondent. That the 1st Respondent is not candid with the court.



19. That the redesignation and reduction of the Petitioner’s salary was a serious administrative process that required the Petitioner to have been accorded a fair hearing. That the action of the 1st Respondent was detrimental to the Petitioner including loss of income and status.
20. To buttress his claim the Petitioner relies on the decision of the Court of Appeal in *Judicial Service Commission v Mbalu Mutava* where the court stated as follows:- ‘Article 47(1) marks an important and transformative development of administrative justice for it not only lays a consultative foundation for control of the powers of the state organs and other administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article 10 such as rule of law, human dignity , social justice, good governance , transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.’
21. The Petitioner further relies on the provisions of Article 47 of *the Constitution*, Section 4(2) and (3) of the *Fair Administrative Action Act*, Section 10(5) of the *Employment Act*, Article 41 of *the Constitution* on the right to fair labour practices and Article 236 of *the Constitution* which protects public officers from being dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.
22. The Petitioner further submits that the establishing and abolishing officers in public service ought to be done within the law and that the 1st Respondent contravened the provisions of Article 47(2) of *the Constitution* having failed to write to the Petitioner informing him that his job designation would be changed and as such violating provisions of Article 236(b) of *the Constitution* and Section 10(5) of the *Employment Act*. To buttress these submissions the Petitioner relies on the case of *Joel Njoroge Wanyoike v Teachers Service Commission (TSC) & 2 others* (2015) where the court stated:-
- “Procedural fairness in employment law (right to natural justice in public law- audi partem rule) requires a party likely to be affected by a decision to be informed in advance.”
23. The Petitioner submits that being a public officer he is protected by Article 236 of *the Constitution* from demotion without due process of the law. That redesignating him from the position of Senior Assistant Land Registrar under Job K and drawing a gross salary of Kshs. 65,770/- to the position of Chief Clerical officer under Job Group J and drawing a less gross salary of Kshs. 51,060/- is in itself a demotion and failure to accord the Petitioner a hearing amounts to unfair labour practice.

The Response

24. The 1st Respondent denied violating the Petitioner’s fundamental rights under Articles 47(1),41 and 236 of *the Constitution* as alleged in the petition. The 1st Respondent explained the circumstances under which the Petitioner’s job group was changed as explained under the Replying Affidavit of John Njogu in paragraph 5 and 6 and that the anomaly had since been corrected. That the change of the designation was not deliberate hence not a violations of Article 47 of *the Constitution*.
25. The Respondent submits that they never demoted the Petitioner as alleged as change of the designation of the Petitioner was a mistake which had since been corrected as evidenced by the letter dated June 21, 2021 addressed to the Petitioner and the IPPD data sheet marked as annexure “JWN2” and “JWN3” in the Respondents replying affidavit hence the Respondents did not breach the provisions of Article 236 of *the Constitution*.



26. The Respondents submit that by the time of the letter indicating that the Petitioner designation had been corrected to read Principal Clerical Officer as per letter dated June 21, 2021 the payroll of the month of June had been closed hence the change of job group could not have been reflected in the June 2021 payslip.
27. The Respondents submit that through their letter dated January 30, 2022 they assured the Petitioner that his pension dues will be calculated as per his latest job Cadre (Principle Clerical Officer) in the civil service Job Group K and not Chief Clerical Officer Job Group J a fact not been denied by the Petitioner in the further affidavit.

Court determination

28. The test for determination of the suitability of a constitutional petition is as set out in *Anarita Karimi vs Republic* (No.1) (1979) 1 KLR 154 defined as follows:- ‘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.’
29. The court is satisfied that the petition before it met out the threshold by stating with precision the violation complaints, the provisions of the Constitution infringed and the manner they were infringed as set out under the particulars.
30. The facts of the Petition are undisputed. It is an established fact that the Petitioner’s job group was changed downwards from job group K to Job Group J without his knowledge and his gross salary reduced from Kshs. 65770/- (SLW4) to Kshs. 51,060/- (SLW5). That effective January 2021 to June 2021 he earned less salary under Job Group J.
31. It is also undisputed fact that the Petitioner was due for retirement on the July 1, 2021 (SLW3).
32. In their Response, the Respondents stated that the position of the Senior Assistant Land Registrar was abolished and the same replaced with the Principal Clerical officer “Job Group K” and that the same was communicated to the Petitioner vide letter dated June 21, 2022. That the change of the Petitioner’s job designation and job group as indicated in the payslip was a mistake and the ministry has since corrected the same as per the IPPD data Capture sheet staff register record for the petitioner and salary progression of the petitioner which shows the error was corrected by the Ministry (JWN3a and b).
33. The letter dated June 21, 2021 (JWN2) addressed to the Petitioner informs him that the Public Service Commission abolished the position of Senior Assistant Land Registrar vide letter of 2nd September 2020 and re-designated him to grade of Principal Clerical Officer ‘Job Group K’ with effect from September 2, 2020. That other existing terms and conditions of service will continue to apply. The attached IIPD Data capture (JWN3a) is an amendment of designation and job group dated June 21, 2021.
34. The Petitioner through his advocates addressed a letter to the Cabinet Secretary of the 1st Respondent dated February 4, 2021 related to the instant petition. There is no response to the said letter before the court. The instant petition was received in court on the April 15, 2021. The letter on the amendment of job group is dated June 21, 2021 almost 4 months after the demand letter and 2 months after the filing of the petition.
35. The Respondents submit it was not possible to effect the change in June salary as the payslip had already been generated and that is a reasonable position .



36. The Respondents further state that the Petitioner's advocates during the pendency of the petition asked for reassurance that the pension would be calculated under his latest job group and the assurance was given to the Petitioner through the office of the Attorney General Kakamega who communicated the same to the Counsel and this was not denied in the further affidavit. The said letter dated January 30, 2022 addressed to the Civil Litigation Department Kakamega does state that the pension dues would be calculated under job Cadre Principal Clerical Officer Job Group K and not Chief Clerical JGJ.
37. The Court, notwithstanding the correspondence by the Respondent with their Counsel during the pendency the petition, finds that the indeed the Petitioner was demoted arbitrarily and paid less salary in violation of Article 236 of *the Constitution*. It is not in dispute that he was a public officer.
38. The Court finds that the letter dated June 21, 2021 refers to a decision of the Public Service Commission of September 2, 2020 effecting the change in designation of the Petitioner on September 2, 2020. This decision was not communicated to the Petitioner at all and further it is not explained in the said letter why his salary was reduced if the existing terms of service continued to apply. The 1st Respondent submits it was a mistake yet it did not respond to the demand letter (SLW6).
39. The Court finds that these actions by the 1st Respondent led to reduced earning and demotion of the Petitioner contrary to the provisions of Article 236 of *the Constitution*. The failure to inform the Petitioner of the decision of the Public Service Commission and the failure to promptly address his complaint on the issues under the letter by the Advocates is a further violation of the Petitioner's right to fair administrative action as provided for under Article 47 of *the Constitution*.
40. The court finds that the acts by the employer led to the filing of the instant petition which is justified as the Petitioner was to retire on the July 1, 2021 (SLW3). The Petitioner is justified to be apprehensive of losing his justified retirement package which is based on the last payslip which in this case reads Job Group J and not his legitimate Job group which was 'K'.
41. The Court finds and determines that the Petitioner is a public officer to whom Article 236 of *the Constitution* is applicable. The Article protects him from demotion and arbitrary reduction of salary without due process.
42. The Court finds that the Petitioner was demoted in a process that is inconsistent with the sacred audi partem rule and contrary to the provisions of Article 47 of *the Constitution*. The court finds violation of the Petitioner's rights as prayed in orders (a) and (b) of the Petition.

Whether the Petitioner is entitled to the relief sought

43. The court has already dispensed with the Prayers (a) and (b) under issue 1
44. Prayer c of the Petition seeks for reinstatement of the salary of Kshs. 65,770/- and the same be used to calculate the Petitioner's retirement benefits. The Respondents in their defence did not dispute this claim and the same is granted. The Court finds and reinstates the Petitioner's legitimate Job Group of K at gross salary of Kshs. 65,770.00 as per his payslip of November 2020 (SLW4) and awards in addition payment of the underpaid amount of salary from January 2021 to June 2021. The gross salary of Kshs. 65,770/- to apply in computation of the retirement dues of the Petitioner.
45. Prayer (d) of the Petition seeks exemplary and punitive damages against the 1st Respondent on account of gross violation of the Petitioner's fundamental freedoms and rights. On this prayer the Petitioner submits that the demotion and reduction of salary without a fair hearing amounts to unfair labour practice which occasioned legal injuries to the Petitioner including in terms of remuneration and such



injuries can be remedied in terms of Article 23 of the Constitution and section 12(3) of the Employment and Labour Relations Court Act.

46. To buttress his claim, the Petitioner relies on the case of James Ang'awa Atanda & 10 others v Judicial Service Commission (2017)eKLR where the court awarded Kshs. 750,000/- as damages for unfair labour practice/breach of contracts and in Rose Esther Muthoni Wamuiya & 2 others v Governor Nyandarua County Government & 3 others (2021) eKLR where the court awarded the Petitioners Kshs. 5,000,000/- each as general damages for breach and violations of their rights.
47. The Respondents submit that the Petitioner had not laid basis for award of exemplary and punitive damages and to buttress their position rely on the authority in Godfrey Julius Ndumba Mbogori & another v Nairobi City Council(2018)eKLR where the court held that exemplary damages are different from ordinary damages whose object is to compensate and on the hand exemplary damages objective is to punish and deter.
48. The Respondents further submit that they had since corrected the job group of the Petitioner and his pension dues will be calculated under job group K as Principal Clerical officer.
49. That the Petitioner did not seek for general damages in the Petition. The Respondent urges the court not to award any general damages as sought in the submissions. That the cases cited in support of award of damages are distinguishable since the facts of the cited cases are different from the petitioners petition.
50. The Court is of the firm position that it can only grant Orders as sought in the Petition. The court has no powers under the enabling Law being Section 12(3) of the Employment and Labour Relations Court Act to grant exemplary and punitive damages. The court agrees with the Respondent that the Petitioner having not sought general damages in the Petition, the court cannot award the same. The Court is bound, just like the parties, by pleadings as filed.
51. The claim of exemplary and punitive damages is disallowed.

Conclusion and Disposition.

52. In final determination of the Petition the court enters judgment for the Petitioner against the 1st Respondent as follows:-
 - a. That a declaration is hereby issued that the Petitioner's enjoyment of rights and fundamental freedoms secured in the Bill of Rights under Articles 41,47 and 236 of the Constitution have been threatened and infringed by the 1st Respondent by failing , neglecting and /or refusing to give the Petitioner a hearing before an adverse administrative process of demotion and reduction of his salary was made.
 - b. That the 1st Respondent violated the Petitioner's right as a public officer to the due protection from demotion and reduction of salary without due process of law as provided under Article 236 of the Constitution.
 - c. An Order is hereby issued for the 1st Respondent to reinstate the Petitioner's salary of Kshs. 65,770/- and to apply in computing the Petitioner's retirement benefits.
 - d. An award for underpayment of salary for months of January to June 2021 (14,710x6) of Kshs. 80,000/- (payable subject to statutory deductions)
 - e. Award of interest at court rates from date of judgment until payment in full.
 - f. The Respondent to bear costs of the Petition.



53. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 22ND SEPTEMBER 2022.

J. W. KELI,

JUDGE.

In the Presence of:-

Court Assistant : Brenda Wesonga

For Claimant:- Absent

For Respondents: Mr. Tarus, Senior State Counsel

