REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. E042 OF 2020

PETER AKURE LOTHIKE.....PETITIONER

VERSUS

PUBLIC SERVICE COMMISSION .....1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF INTERIOR & COORDINATION

OF NATIONALCOVERNMENT.....2ND RESPONDENT

DEPUTY COUNTY COMMSSIONER,

TURKANA CENTRAL SUB COUNTY.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL..... 4TH RESPONDENT

JUDGEMENT

The etitioner is a male adult. The 1st respondent is established under article 233 of the Constitution, 2010 with mandate to establish and abolish office in public service and exercise disciplinary control over person in those offices. The 2nd respondent is cabinet secretary for interior under which the petitioner served. The 3rd respondent was the supervisor to the petitioner and the 4th respondent is established under article 156 of the constitution.

Petition

The petition is that the 1st respondent employed the petitioner as assistant chief for Kang'risae sub location within Turkana County. The petitioner received information that there were cattle rustlers in his location when he sought the assistance of three administrative police officers and the cattle rustlers were arrested but later released as there were no means to take them to Lodwar police station which was 180 kilometres away.

Upon release the cattle rustlers made report to the police station that they had been assaulted and illegally detained and assaulted.

The petitioner was arrested and charged with 6 counts of assault and unlawful conferment and the cattle rustlers were the complainants.

The petitioner was dismissed from service as assistant chief by letter dated 17th August, 2018 taking effect on 20th November, 2015. He lodged an appeal against the decision and which appeal was dismissed by the employer.

The petition is that there was no fair hearing of the matter and this resulted in unconstitutional and unlawfulness. The respondents violated the provisions of Article 10, 22, 23, 41, 43, 47, and 232 of the Constitution. He was not treated fairly; his rights to economic and social rights and fair administrative action were not protected.

The petitioner is seeking the following remedies;

a. A declaration that the termination of service as assistant chief is in contravention of his right to fair labour practices and unconstitutional;

b. An order of reinstatement as the assistant chief Kang'risae sub location; and

c. Costs of the petitioner.

The petition is supported by the Affidavit of the petitioner, he filed his witness statement and testified in support of his petition and relied on his documents filed with the petition.

The petitioner testified that in the course of his duties in his sub location of King'risae within Turkana County he encountered cattle rustlers and could not take those to the police station which was 180 kilometres away and hence released them. On 20th November, 2015 he was charged at Chief magistrates Court at Lodwar with 6 counts of alleged assault and unlawful confinement. On 8th January, 2016 he was issued with letter of interdiction by the 2nd respondent and based on the on-going criminal charges under **Lodwar Principal Magistrates Court Criminal Case No.906 of 2015 – Republic versus Peter Akure Lothike.**

The petitioner also testified that on 17th May, 2017 he was convicted and sentenced to pay a fine of ksh.255, 000 with an alternative of 4 months prison sentence for each of the 6 counts. He paid the fine of Ksh.150, 000 and was released. He was not able to appeal within 14 days as required and has made application to appeal out of time.

On 20th May, 2017 the petitioner received letter dated 6th March, 2017 indicating that he as being considered for dismissal of his employment on account of gross misconduct having been arraigned in court. he respondent thereto on 24th May, 2017 and explained the circumstances to his being charged and which was from false allegations based on political differences with the former member of the county assembly and a local politician and he declined to support their political campaigns.

The petitioner also testified that he received letter dated 17th August, 2018 from the 1st respondent dismissing him from employment with effect from 20th November, 2015.

On 7th September, 2018 the petitioner lodged his appeal to the 2nd respondent and explained his case, on 1st September, 2019 he wrote seeking a response, on 3rd February, 2020 he made further enquires and until he instructed his advocates on the mater whereupon he received letter dated 6th May, 2020 that his appeal had been dismissed.

Termination of employment was unlawful, unconstitutional and lacked merit and the remedies sought should be issued.

Upon cross-examination the petitioner testified that on 8th January, 2016 he was interdicted and given the reason that he had assaulted some people and was charged in court on 20th November, 2015. In the criminal case he was found guilty. He paid the fine and released immediately upon paying ksh.150, 000. He was issued with a notice to show cause due to the criminal charges and allowed his reply on 24th May, 2017.

The criminal case ended.

On 17th August, 2017 he received letter dismissing him from service on account of conviction in the criminal case. The human resource of the respondent gave him a hearing after the conviction.

In response to the petition, the respondents filed Grounds of Opposition and replying Affidavit of Benson Githua and human resource director with the 1st respondent and on the grounds that the petitioner has not demonstrated in any manner how the respondents have violated his constitutional rights as required by the principles outlined in the case of **Mumo Matemu versus Trusted Society of Human Rights Alliance & 5 others [2013] eKLR.** The constitutional rights violated have not been cited or particularised contrary to the principles set out in the case of **Anarita Karimi Njeru versus Republic [1979] eKLR.** The petitioner's interpretation of the constitution is misleading and should have filed a claim as held in **Francis Atoya Ayeko versus Kenya Police Service & another [2017] eKLR.**

The response is also that the petition is in abuse of court process and should be dismissed.

The respondents did not call any witness and opted to file written submissions.

Petitioner submitted that on 17th May, 2017 he was convicted and sentenced on 22nd May, 2017 and paid a fine of ksh.150, 000 and released. On 6th March, 2015 he received a show cause notice to explain why his explain why his employment should not be terminated upon conviction with a criminal offence and hence gross misconduct. He replied on 24th May, 2017 but on 17th August, 2018 he was issued with letter of termination of his employment.

The petitioner submitted that in the case of **Cecilia Wangechi Ndungu versus County Government of Nyeri & another [2014] eKLR** the court held that the pleasure doctrine does not apply in the public service and persons holding public office are servants of the people under the new constitutional dispensation as held in the case of **Narok County Government & another versus Richard Bwogo Birir & another [2015] eKLR.** Disciplinary process should not be actuated by malice directed by superiors and a hearing of the employee should be conducted as held in **Samson Ole Kisirkoi versus Maasai Mara University & 3 others Petition No.8 of 2017.**

The petition should be awarded as pleaded.

The respondent submitted that the petition does not address any breach of the constitution as required and the petitioner ought to have filed a claim. Where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialise the jurisdiction of the constitutional court by bringing actions that could well and effectively be dealt with in that other forum as held in the case of **Gabriel Mutava & 2 others versus managing Director Kenya Posts Authority & another [2016] eKLR.** In the case of **Jane Angila Obando versus TSC & 2 others, Petition No.4 of 2020** and the court held that the issues raised in the petition could have well been resolved without invoking the constitutional route and this is reinforced by the Court of Appeal in **Sumaiyya Athnami Hassan versus Paul Masinde Simidi.** The petition lacks the threshold of a constitutional case.

The respondents also submitted that the petitioner's employment was terminated upon fair procedure. On 8th January, 2016 the petitioner was interdicted upon being arraigned in court on 20th November, 2015 on charges of assault and unlawful detention of persons. The petitioner was prosecuted and found guilty and sentenced on 22nd May, 2017 and fined a total sum of ksh.150, 000 and which he paid.

The respondents waited until the end of the criminal proceedings to commence disciplinary action against the petitioner as held in the case of **James Mugera Igati versus PSC [2014] eKLR**. The petitioner was issued with a notice to show cause and he replied on 24th May, 2017 and on good basis and premised on section 44 of the Employment Act, his employment was terminated for gross misconduct.

The orders sought should not issue as the petition is not justified and taking into account employment terminated over three years ago, the order of reinstatement is not available.

Determination

The petitioner filed his petition on 24th August, 2020 claiming the violation of his rights. The basis of the petition is that by letter dated 6th March, 2017 the petitioner was dismissed from his employment with the 1st respondent following his conviction in Lodwar Principal Magistrate Criminal Case No.**906 of 2015 – Republic versus Peter Akure Lothike.** The petition is also that the petitioner received the letter terminating his services on 20th May, 2017. He has since lodged an appeal to challenge the criminal conviction.

In reply to the petition, the respondents filed grounds of opposition. There is no material response by the petitioner to these grounds of opposition.

The court is currently faced with a plethora of petitions which ought to have been initiated by way of Memorandum of Claim. This is captured in **Jane Angila Obando versus TSC & 2 others, Petition No.4 of 2020** and where the court held that;

> The right to apply to the High Court under …..of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under …. the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court or being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.

This position is reiterated as submitted by the respondents by the Court of Appeal in the case of **Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR** and where the court held as follows;

> 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
>
> …
>
> 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…

In employment and labour relations, the court proceedings are regulated under the Employment and Labour Reactions Court (Procedure) Rules, 2016 and under Rule 7 (3) a party is allowed to address a constitutional question, if any, through a Memorandum of Claim.

Further to the above, the filing of a constitutional petition instead of a Memorandum of Claim so as to save and hide oneself behind such provisions to avoid the requirements of the law is abuse of court process. Where a party ought to file a Memorandum of Claim so as to claim for reinstatement, such should be properly addressed and a petition framed under constitutional provisions cannot save the party from the obvious. The remedy of Reinstatement is regulated under the Employment and Labour Relations Court Act, 2011 and section 49 of the Employment Act, 2007. Such remedy cannot issue outside of the set timelines even where a party has moved the court by petition and couched the remedy as a violation of his constitutional rights.

The instant dispute ought to have been filed as a claim. The grounds of objections by the respondents ought to have been addressed instantly.

The above put into account, termination of service was vide letter dated 17th August, 2018. This was proceeded by interdiction and notice to show cause dated 6th March, 2017. The petitioner alleges that he received such letter and notice on 20th May, 2017. He lodged an appeal with the 2nd respondent and has appealed and applied extension to file an appeal out of time on the judgement of the Principal Magistrate, Lodwar.

Even where the claimant ought to have filed a claim and not a petition, the issue in dispute is clear. It relates to termination of employment.

The petitioner admitted that on 17th May, 2017 he was convicted with a criminal offence of assault and unlawful detaining of persons in Lodwar Principal Magistrates Court Criminal Case No.906 of 2015. On 8th January, 2016 he was interdicted on account of gross misconduct following the criminal charges on 20th November, 2015 and on 6th March he was issued with a notice to show cause why his employment should not be terminated on account of gross misconduct. The petitioner replied on 24th May, 2017.

On 21st June, 2018 the conduct of the petitioner was discussed, his responses put into account and a decision taken that his employment be terminated.

By letter dated 17th August, 2018 the respondents informed the petitioner that;

> DISMSISAL FROM THE SERVICE
>
> This is to convey to you the decision of the Authorised officer that you be and are hereby dismissed from the service with effect from 20th November, 2015 on account of contravention by the court.
>
> Note that on dismissal, you have forfeited all claims to terminal benefits with the government. …

Upon the interdiction of the petitioner on 6th January, 2016; being called to show cause why his employment should not be terminated and on his written response, fair labour relations dictated that he should have been called to respond to any matter(s) addressed therefrom.

In the case of **Robi Stephen Nyamohanga v Judicial Service Commission [2017] eKLR** the court held that;

> Being an employee the Claimant is also subject to the provisions of section 41 of the Employment Act which provides that an employee must be given a hearing before a decision is made to terminate his employment on grounds of misconduct, poor performance or physical incapacity.
>
> In the present case the Claimant was not given any hearing at all and his summary dismissal was clearly in violation of the provisions of the Judicial Service Act, the Employment Act and Article 236 of the Constitution which provides that
>
> 236. A public officer shall not be—
>
> a. victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or
>
> b. dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.

An interdiction is just but an administrative measure removing the employee from the shop flow. Its purpose should be addressed and the employee found to have committed misconduct or of gross misconduct invited to show cause and a hearing to follow. Where there is no case, the employee should resume duty. In the case of **Grace N Akinyi versus Narok County government Cause No.67 of 2019 (Nakuru)** the court held that;

- the employer has the prerogative of taking administrative action in form of a suspension, forced leave or interdiction to allow for investigations or as the case may require and the purpose is to remove the employee from the workplace to allow for investigations. Upon investigations, the employee may be issued with a show cause notice or where found not culpable be returned to work

In this case, The respondents opted to keep the petitioner on interdiction until his criminal case in Lodwar Principal Magistrates Court was finalised and he was convicted. In the Replying Affidavit of Mr Githua sworn on 16th November, 2020 he has attached *Minutes of the Ministerial Human Resource Management Advisory Committee* on discipline case held on 21st June, 2018 and present were several officers and it was noted that the petitioner addressed the allegations against him in writing. A ruling was delivered that he should be dismissed from the service.

Even where the employer has a valid and good cause to terminate employment, the motion of section 41 of the Employment Act, 2007 are mandatory. Following the notice to show cause, the petitioner ought to have been allowed a hearing in the presence of another employee of his choice.

Even in a serious case of gross miscount, section 41(2) required that the petitioner be issue with notice and allowed the benefit of the law, a hearing in the presence of another employee of his choice. Where such hearing and attendance were not possible, the exceptional

circumstances removing the respondents from such adherence ought to have been addressed.

In the case of **Standard Group Limited v Jenny Luesby [2018] eKLR** the court held that;

> The Act goes further in **section 41** *to lay out the procedure to be followed in matters of termination of employment, thus:-*
>
> 1. Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
>
> 2. Notwithstanding any other provision of this Part, 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. [Emphasis added].

In further addressing the importance of hearing the employee at the shop floor, the Court went to find that

> There are no exceptional circumstances that have been established by the respondent that the case against the claimant was so severe that she could not be accorded the basic minimum. That is notice and a hearing made before the summary dismissal. That hearing is as important as the law made it mandatory even in the worst case scenario where an employee grossly misconduct oneself. The right to hearing is what amounts to meeting the true tenets of natural justice. Such a hearing in an employment relationship should be conducted in the presence of the affected employee together with another employee of her choice as this is the true meaning of a fair hearing. However senior an employee is, where the case is that of misconduct, the seniority is not justification for failure to meet the mandatory provisions of the law. It remains a sacrosanct duty for an employer to uphold. This was denied of the claimant and I find this to be an unfair labour practice.

In this case, the respondent well aware of the matters facing the claimant, having interdicted him from the service, a notice to show cause having issued, the least that should have been done was to invite him for a hearing during the meeting held on 21st June, 2018. The respondent had kept the petitioner in employment that long. To rush up the process so as to issue him with letter dismissing him without a hearing go contra to section 45(2)(c) read with 45(5)(a) of the Employment Act, 2007;

> 2. A termination of employment by an employer is unfair if the employer fails to prove—
>
> …
>
> c. that the employment was terminated in accordance with fair procedure.

And that;

> 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;

There conviction of the petitioner admitted and being a matter addressed in law and gross misconduct pursuant to section 44 of the Employment Act, 2007 procedural fairness led to unfair termination of employment.

The dismissal from service vide letter dated 17th August, 2018 was backdated to 20th November, 2015. The foundation of such decision to backdate the dismissal from service is not backed by any law or decision at the meeting held to discuss the petitioner's case on 21st June, 2018. Such double punishment is not justified. Nothing stopped the respondents from addressing any arising misconduct of the petitioner immediately he was charged in Lodwar Principal Magistrates Courts with a criminal offence.

The respondents opted to wait until the criminal trial concluded.

The petitioner remained in the employment of the respondents until letter and notice dated 17th August, 2018.

The compensation due should comprise the payment of all unpaid wages and attendant allowances for the entire period of employment and which remains unpaid and up and until 17th August, 2018.

On the remedy sought for reinstatement, there exists valid reasons and leading to dismissal from service. the petitioner is a convicted offender. The pending matter of appeal and application seeking time extension to file appeal out of time is lost pursuant to section 43 and 44(4) of the Employment Act, 2007. Where the employer genuinely believes there termination of employment was due to a reason existing at the time, such being the criminal conduct of the petitioner and who has since been charged and found guilty, to order reinstatement back into employment of the respondent would be contrary to good order and rule of law.

There is no material upon which the court can assess the unpaid wages due to the petitioner. Such can well be addressed at the shop floor.

Accordingly, the petition is found without merit save the petitioner shall be paid his due wages and which remain unpaid for the period ending 17th August, 2018. Such shall be assessed and paid by the 1st respondent within sixty (60) days. Where there is no payment, the dues owing, if any, shall be paid with interests at court rates. Each party shall bear own costs.

DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2021

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

…… and ……..