REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 34 OF 2017

CHRISTOPHER AMASAVA.....PETITIONER

-VERSUS-

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. The Petitioner filed a Petition on 4.7.2016. He averred that his dismissal by the 1st Respondent was in contravention of his fundamental rights as it failed to ascertain and recognise that his arrest and arraignment by in Court, by the now defunct Kenya Anti-Corruption Commission was irregular and illegal for failure to adhere to the provisions of section 35 of the Anti-Corruption and Economic Crimes Act. He further averred that, his suspension was in breach of his rights as he was denied his salary pending investigation and criminal charges against him.

2. The petition seeks the following prayers:

a. A Declaration that the Petitioner's right as enshrined in the Constitution with respect to fair employment practices had been infringed by the acts and/or omissions of the 1st Respondent.

b. A Declaration that Clause 9 of the 1st Respondent's Code of Conduct is unconstitutional.

c. A Declaration that the Petitioner's dismissal was irregular, unlawful and unconstitutional.

d. A Declaration that the Petitioner is deserving of his due salary allowances and benefits from May 2006 to December 2015 amounting to Kshs. 12,217,848/-.

e. A Declaration that the Petitioner is deserving of damages to be assessed by this Honourable Court.

f. A Declaration that the Petitioner is due and deserving of his Pension for the years worked in the public service with the 1st Respondent.

g. Costs and Interests.

3. The 1st Respondent filed its Statement of Response on 9.7.2019. It denied that the Petitioner's dismissal pursuant to his arrest was in complete contravention of his fundamental rights. It averred that it was guided by Clause 9 of its Code of Conduct which allowed it to take any disciplinary action notwithstanding the pendency of criminal proceedings; that it could not have contravened Article 50 (1) (o) of the Constitution which was yet to be promulgated at the time of the dismissal, 13.9.2006. Finally, it averred that the dismissal was founded in law and Clause 9 of its then Code of Conduct was in line with the Constitution.

4. The Petitioner filed his Reply to the Statement of Response on 28.7.2019. He contended that the 1st Respondent's failure to give him the requested documents and sufficient time to defend himself before the disciplinary committee on 7.9.2006 was in contravention of Article 50 (c) of the Constitution. He maintained that the Code of Conduct cannot be used to substitute an existing law and that he had every right to commence the proceedings herein under Article 22 (1) of the Constitution. He also maintained that under section 45 (2) of the Employment Act, dismissal is unfair if an employer fails to prove that it was in accordance with fair procedures under section 41 of the Employment Act. Finally, he contended that the 1st Respondent's was only allowed to interdict and suspend but not dismiss an employee whose case was initiated by the now defunct KACC.

5. The matter proceeded for hearing and the parties thereafter filed their written submissions.

Petitioner's case

6. The Petitioner testified as Pw1 and relied on his supporting affidavit filed on 4.7.2016 as his evidence-in-chief. He stated that he was employed in 1986 as a Revenue Clerk with the Income Tax Department of the Ministry of Finance ; that he was absorbed by the 1st Respondent as a Higher Clerical Officer vide a letter of appointment dated 23.9.1996 and later promoted to the position of Assistant Revenue Officer on 19.8.2002.

7. He stated that on 18.5.2006, he was arrested by officers of the KACC and on 19.5.2006 he was charged in Court together with his co-employee in C.M.C A.C.C Case No. 35 of 2006 contrary to sections 39 (3) (a) and 48 (1) of the Anti-Corruption and Economic Crimes Act (ACECA). As a result, the 1st Respondent suspended him without salary vide the letter dated 22.5.2006 on ground that the charges levelled against him were against its Code of conduct. He responded by his letters dated 23rd and 29th May 2006, explaining the circumstances of the events of 18.5.2006 but the 1st Respondent proceeded to invite him to a disciplinary hearing set for 7.9.2006.

8. He further stated that he was aggrieved by the decision to commence the said disciplinary proceedings and proceeded to institute judicial review proceedings against the 1st Respondent being **H.C. Misc Case No. 493 of 2006 Christopher Ketoyo Amasava v Kenya Revenue Authority.** Despite the filing of the judicial review proceedings, the 1st respondent proceeded with disciplinary proceedings against him and on 13.9.2006, he was informed that he was found guilty of the charges of misconduct and that he had been dismissed from employment.

9. He further stated that the on 27.9.2006, the court granted him leave to file a Judicial Review Application and directed that the leave shall operate as stay of his right to appeal against the 1st Respondent's letter dated 13.9.2009. He further stated that the successor of the KACC, the Ethics and Anti-Corruption Commission (EACC), withdrew the charges against him under section 87A of the Criminal Procedure Code despite his objection. Thereafter he sought for certified copies of Decision and proceedings but they were delayed till 18.1.2012 forcing him to file his appeal on 13.2.2012 and the respondent ignored it.

10. Finally, he contended that he has not received any of his benefits including his pension for all his years of service and prayed for the reliefs sought in his petition.

11. On cross-examination, he admitted that Part IV of the Respondent's Code of Conduct provides for instant suspension if an employee is charged. He further admitted that he was arrested and charged with a criminal case in court and released on bond after one day. He also admitted that by the letter dated 22.5.2006, he was suspended and he responded on 23.5.2006. Finally, he admitted that he was invited to a hearing where he presented his evidence, both orally and written.

12. He testified that he was dismissed by the letter dated 13.9.2006 and was given an option to appeal. He contended that he appealed on 13.2.2012 after the withdrawal of the Criminal case on 11.1.2012 as ordered by the Court in the Judicial Review Application, but the 1st Respondent did not respond to his appeal to him even after serving a reminder on 20.2.2012.

13. He admitted that he was paid the refund of his pension contribution and he signed a clearance form with KRA in order for him to receive payment.

14. Upon re-examination, he maintained that he was dismissed on an allegation by the then Kenya Anti-Corruption Commission and that KRA was not the complainant. He contended that he was invited to a disciplinary hearing on 29.8.2006 but he was away and his lawyer sought an adjournment of the hearing until the criminal case was over. However, he told the Court that the hearing took place on 7.9.2006 despite the fact that he asked for information but the respondent declined to give the same.

15. He maintained that after the criminal case, he went to Court to get typed proceedings and the judgment but they were delayed. He further told the court that he lodged his appeal on 13.2.2012 which was immediately when he received the typed proceedings. He further told the court that he challenged section 87A of the Criminal Procedure Code because it was not fair for him to be released under that section. Finally, he clarified that the pension he received was very minimal and it was only a refund of his contribution.

1st Respondent's case

16. **Mr. Frankline Kiogora Gitonga, the 1st Respondent's Human Resource Manager** testified as Rw1 and adopted his witness statement filed on 21.2.2020 as his evidence in chief. He told the court that the Petitioner, together with another employee, were arrested by officers of KACC and charged with the offence of soliciting a bribe contrary to the provisions of sections 39 (3) (a) and 48 (1) of the Anti-Corruption and Economic Crimes Act. He further stated that the Petitioner was suspended owing to the said charges and thereafter he was afforded a hearing before the 1st respondent's Disciplinary Committee on 7.9.2005 and he was dismissed vide a letter dated 13.9.2006.

17. He contended that the Petitioner was at liberty to prefer an appeal against the penalty meted out on him pursuant to Part 8 of the Code of Conduct but he opted to commence the judicial review proceedings in which the his right of appeal was stayed pending the finalization of the criminal case. He stated that the case was withdrawan on 11.1.2012 and the Petitioner's right to appeal against the findings of the Disciplinary Committee crystallised. However, he did not lodge any appeal until 13.2.2012 and the Respondent ignored it because the period to lodge an appeal had lapsed. Consequently, he contended that the Petitioner cannot purport to fault the 1st respondent for failing to determine his appeal since there was no valid appeal.

18. Finally, he clarified that the 1st respondent cleared with the Petitioner and there are no further dues owing to him.

19. On cross-examination, he admitted that the criminal case was not initiated by the 1st respondent and it did not carry out investigations. He stated that the Code of Conduct provides for suspension upon arrest and charging of the 1st respondent's officer. He contended that he was not aware that the Petitioner requested for information or documents before attending the disciplinary hearing.

20. He reiterated that the Petitioner was paid all his dues and cleared with the 1st respondent. He clarified that there was an error in his Witness Statement on the period within which to file an appeal and stated that it was to be filed between 26.1.2012 and 10.2.2012. He testified that the delay in filing the appeal was occasioned by the Petitioner and denied that the 1st respondent was privy to the court process.

21. In re-examination, he stated that the Petitioner lodged the appeal on 13.1.2012 which was outside the time set by the court in the Judicial Review suit. He stated that the Petitioner's criminal case ended on 11.1.2012 and he had 16 days to appeal in accordance with the stay order.

Petitioner's submissions

22. The Petitioner submitted that it was not logical for him and his co-accused to solicit for a bribe of kshs. 600,000 prior to their arrest on 18.5.2006 in order to pay the taxpayer Kshs.9000 out of a debt of Kshs. 609,000.

23. He argued that the 1st Respondent failed to give him a show cause letter as provided in the 1st Respondent's code of conduct and contended that the suspension dated 22.5.2006 is not the same as a show cause. He further submitted that placing him on suspension did not mean that the accused person was guilty and contended that that as long as the contract of the Petitioner was not terminated, he was entitled to full pay and statutory retirement benefits contribution.

24. He relied on **Thomas Sila Nzivo v Bamburi Cement Ltd [2014] eKLR** where the Court held that no provision under the Employment Act allows the employer to deny a suspended employee his monthly salary. It was his submission that the suspension and dismissal letters by the 1st Respondent dated on 22.5.2006 and 13.9.2006 should be quashed following the judicial review orders in **Application No. 493 of 2006** and the 1st Respondent directed to reinstate him to his employment position.

25. He relied on **Peterson Ndung'u & others v Kenya Power and Lighting Company Ltd [2014] eKLR** where the Court held that the Employment Act has no provision suggesting that an employee whose contract is still running should forfeit his monthly salary when on preventive or administrative suspension. He further submitted that section 19 of the Employment Act has no provision allowing an employer to deny a suspended employee his monthly salary as a warning to the effect of losing his /her job.

26. He submitted that the 1st Respondent dismissed him prior to the court's finding such that even if the courts declared him innocent or found that the allegations were unfounded and he was to resume his work, the 1st Respondent would not accept him due to the presumed guiltiness which was yet to be proved. According to him, any suspension in the public service where courts are involved, should be taken as the last resort after the courts have determined the matter.

27. He submitted that the 1st Respondent's Human Resource Manual provides for a disciplinary procedure which includes service of a show cause letter, interdiction, suspension and a hearing. However, the 1st Respondent failed to give the Petitioner details of the charges which are explained in a show cause letter.

28. He argued that the 1st Respondent's decision to suspend him without emoluments was in contravention of section 62 of the EACC procedure. He submitted that though he received a dismissal letter dated 13.9.2006 offered him terminal benefits with no salary up to the date of dismissal, accrued leave and pension.

29. He submitted that his appeal was rejected without a hearing and that he was invited to the disciplinary hearing on 29.8.2006 without having being provided with clear details of his suspension because he did not understand the contents therein. He further submitted that he was not given a reasonable notice of 5 working days prior to the disciplinary hearing. It was his submission that 2 days was inadequate time for him to prepare for the disciplinary hearing.

30. He cited section 43 (1) of the Employment Act and submitted that if the 1st Respondent was not satisfied with his defence letter dated 23.5.2006, the law required it to carry out exhaustive investigations while giving him the opportunity to face his accusers and witnesses physically.

31. He submitted that the responsibility of the 1st Respondent was to provide evidence to the effect that the accused person's conduct contributed to his own termination, but most importantly to show that the 1st Respondent followed the termination procedure as stipulated under section 43 (1), 41 (2) and 45 (2) of the Employment Act.

32. For emphasis, he relied on **Public Prosecutor v Yuvaraj (1970) 2 WLR** that the burden of proving a corrupt act is placed on the prosecution or the complainant. He therefore submitted that the accused person has to demonstrate on a balance of probabilities that he was not acting corruptly and that is what he did in his letter to the 1st Respondent dated 23.5.2006.

33. He submitted that the issue being gross misconduct, the sanctions open for the 1st Respondent included demotion in rank, transfer to another station, stoppage of incremental amount and retirement in the public interest. It was his submission that dismissal was the last resort and that the 1st Respondent ought to have exhausted all the disciplinary sanctions before dismissing him.

34. He submitted that it was within his employment rights to be allowed to seek redress either through appeal or seek legal redress to enforce

his rights to fair trial and that the appeal was a very important process of his disciplinary process which the 1st Respondent failed to consider. In his view the main issue herein is whether the 1st Respondent acted fairly within procedure in dismissing him and relied on **Patrick Njuguna Kamau and 26 others v Wilham (K) Limited [2017] eKLR** where the Court held that the termination of the employees' employment was unfair for want of due process.

35. He maintained that he could only be dismissed if the courts found him guilty after assessing the documents and evidence presented. He further submitted that the 1st Respondent's action of denying him information and documents necessary for his defence was a violation of Article 50 (2) (c) of the Constitution.

36. He argued that paragraph 9 of the 1st Respondent's code of conduct which allows it to take disciplinary action notwithstanding the pendency of criminal proceedings cannot be allowed to substitute the constitutional powers of the Ethics and Anti-Corruption Commission Act in administratively dealing with corruption matters. It was his position that the 1st Respondent was required to domesticate section 62 of the EACC Act in its code of conduct to avoid duplication in the application of the law.

37. He submitted that the 1st respondent's code of conduct could comfortably apply in this dispute only if the relationship between the employee and employer was private.

38. He contended that the 1st Respondent's code of conduct was maliciously constructed to punish employees on suspension and that by refusing to pay them their salary, it was disabling their financial ability to honour the terms of suspension or to fairly defend a salary to themselves before its disciplinary proceedings. In support of this position, he relied on **Sheikh Abubakar Bwanakai v Judicial Service Commission & another [2017] eKLR** where the Court held that a code of conduct that allows an employee to be without any form of salary or allowance while still under contract is in breach of fair labour practices.

39. He submitted that for the code of conduct to have a force of law to dismiss any public employees in a matter originating from the EACC, its authority has to be sanctioned by the National Assembly. He relied on **Misc. Judicial Review No. 493 of 2013 between himself and Kenya Revenue Authority** that KRA's Code of Conduct, the Rules and Regulations (2005), had no force of law as anticipated under section 27 of the Interpretation and General Provisions Act.

40. He submitted that the extension of the hearing and determination of his case beyond the required 3 months as specified in the 1st Respondent's code of conduct was against Article 41 (1) (2) (a) and Article 47 (1) & (2) of the Constitution. He argued the Constitution, 2010 applies to his grievances pursuant to Part 2 of the 6th Schedule. He maintained that the decision to dismiss him on grounds of misconduct without a specific charge was unconstitutional. He stated that the allegations in the letter dated 22.5.2006 did not amount to a specific charge and relied on **Sigilai & another v Republic (2004) KLR 48** on the principles governing a charge sheet.

41. In his supplementary submissions, the Petitioner basically reiterated the above submissions. He reiterated that the early action by the 1st Respondent in punishing him communicated that he was guilty even before carrying out any investigations to prove the allegations brought against him. He submitted that the 1st Respondent failed to meet the minimum statutory standards of proof by failing to substantiate the claims of criminality and also failing to report the matter to the police. He maintained that the summary dismissal was not substantively justified, valid and fair under section 45 of the Employment Act. He further argued that there was an obvious and manifest illegality in the decision making process of the 1st Respondent in dismissing him which makes the impugned decision unsustainable.

1st Respondent's submissions

42. The 1st Respondent submitted that the Petitioner is guilty of laches in enforcing his right to appeal against the decision to dismiss him. It submitted that by 11.12.2012, when the criminal charges were withdrawn, the Petitioner only had 16 days which means that he was to do so by 27.1.2012. According to the 1st respondent, the petitioner failed to lodge his appeal within the requisite 30 days period as prescribed in the Code of Conduct and advised in the dismissal letter, and as such the right was extinguished and the dismissal stood unchallenged.

43. It submitted that the letter dated 13.2.2012 was received out of time and even if it was to give the Petitioner the benefit of doubt and compute the 30 days window from, 11.1.2012 then the Petitioner ought to have lodged his appeal by 10.2.2012.

44. It submitted that the Constitution 2010 and the Employment Act 2007 are not applicable to this petition because the events leading to the alleged breaches of the Constitution including the dismissal of the petitioner occurred in 2006 before the enactment and promulgation of the said law. It relied on **Petition 94 of 2011 Duncan Otieno Waga v Attorney General** where Majanja J. held that the acts of the 1st Respondent therein were in reference to the former constitution and that Article 23 (1) and 615 entitle a person to apply to the Court for redress where fundamental freedoms were violated or infringed but do not entitle the Court to apply the Constitution retrospectively.

45. It further relied on **Stella Mukwayanga Reche v Mastermins Tobacco Kenya Ltd [2014] eKLR** where the Court held Employment Act 2007 was not applicable to the suit and went on to determine the dispute on the basis of repealed Employment act Cap 226 and the contract of employment.

46. It submitted that even if the current constitution was to the applied, which is not the case, the instant Petition is an ordinary claim couched in a Petition to circumvent statutory time limitation. It reiterated that the suit is time barred under section 90 of the Employment Act since the cause of action arose on 13.9.2006 when the petitioner received his dismissal letter. For emphasis, it relied on Cause No. 1201 of 2012 **Banking Insurance and Finance Union (K) v Bank of India.**

47. It further submitted that the Petitioner was granted a fair hearing as per the dictates of the law and principles of natural justice hence his

termination was fair and in line with the 1st Respondent's Code of conduct and the Employment Act Cap 226 then in force. Consequently, it reiterated that the Petitioner is not entitled to the reliefs sought since the dismissal was fair and justifiable and prayed for the suit to be dismissed with costs.

48. In addition, the respondent submitted that the petition does not meet the competence threshold for adjudication as a constitutional competence. For emphasis, it relied on **Anarita Karimi Njeru v Republic (1979) eKLR** and **Mumo Matemu v Trusted Society of Human Rights Alliance & Others [2013] eKLR.**

49. As regards the reliefs sought, the respondent maintained that the prayers sought are based on the Constitution 2010 which cannot be applied retrospectively, and that the Petitioner did not set out his case precisely as required of a constitutional petition. It therefore urged the Court to strike out the Petition with costs and relied on **Job Cheruiyot Keruiv Attorney General & 2 Others [2018] eKLR** for emphasis.

50. It submitted that the signatory of the dismissal letter dated 13.8.2006 was signed by the Head of Department of the Human Resource Department who was Senior Deputy Commissioner and not a Commissioner under section 11 (4) of the Kenya Revenue Authority Act.

51. As regards the allegation that the Code of Conduct was inconsistent with the EACC Act, the Anti-Corruption and Economic Crimes Act and sections27 and 34 of the Interpretation and General Provisions Act, the respondent submitted that it was not. It further submitted that the prosecution by KACC and the disciplinary processes are two distinct processes and that the Court did not grant orders of stay to prohibit the Respondent's disciplinary Committee from the hearing the matter but granted stay at the appeal stage.

52. It submitted that the suspension in this case was not pursuant to section 62 (1) of the Ac but under the Respondent's code of conduct. Consequently, it denied that it did not violate any of the Petitioner's constitutional and statutory rights ad reiterates that there was no valid appeal against its decision to warrant this Petition.

Issues for determination and analysis

53. Having carefully considered the pleadings, evidence and submissions presented by the two sides, it is common ground that the petitioner was arrested by Anti- corruption officers and charged in court with Corruption Case No. 35 of 2006 on 19.5.2006. It is also a fact that, following the said criminal charges, the respondent served the petitioner with a suspension letter dated 22.5.2006 which also invited him to show cause while disciplinary action should not be taken against him for the alleged misconduct of soliciting for a bribe. It is also a fact that the petitioner responded to the said letter and thereafter he was given an oral disciplinary hearing. It is clear that the petitioner was dismissed for the said offence, and he was given the right of appeal within 30 days but he did not and instead he filed a Judicial Review Application which culminated in an order staying the right of appeal until the determination of the criminal case. Finally, it is clear that the respondent raised a preliminary objection to the petition herein and the court dismissed on 18.1.2019 and no appeal was preferred against that decision.

54. The issues for determination are:

a. Whether the Constitution 2010 and the Employment Act No. 11 of 2007 are applicable to this petition.

b. Whether the disciplinary proceedings ought to have been halted until the conclusion of the petitioner's criminal proceedings.

c. Whether Clause 9 of the respondent's Code of Conduct is inconsistent with Article 27 & 41 of the constitution and section 62(2) & (3) of the Economic and Anti-Corruption Crimes Act.

d. Whether the Petitioner's suspension and dismissal was unlawful, unfair, wrongful

e. Whether the Petitioner is entitled to the orders sought

Whether the Constitution 2010 and the Employment act No. 11 of 2007 applies to this petition.

55. The Petitioner was suspended on 22.5.2006 and dismissed on 13.9.2006. In his Petition, the Petitioner averred that there was a complete violation of his rights under Article 50 (2) of the Constitution and that the Clause 9 of the Code of Conduct was in breach of Article 41 (1) & (2) (a) of the Constitution. Additionally, his reply to the Statement of Response, he referred to section 45 (2) of the Employment Act and Article 41 (1) and (2) of the Constitution. However, the 1st Respondent's case is that the 2010 Constitution and the 2007 Employment Act cannot be applied retrospectively and maintained that the repealed Employment Act Cap 226 is the applicable statute.

56. It is common knowledge that the Employment Act and the Constitution of Kenya were enacted and promulgated 1 year and 4 years respectively after the cause of action herein arose. It is trite law that the Constitution and statutes are generally not applied retrospectively unless the same is expressly provided for. I gather support from the Supreme Court decision in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** where the Court held that:

> ***"...As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature… At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or***

provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution." *[Emphasis added]*

57. Articles 263 and 264 of the Constitution respectively provide:

> ***"This Constitution shall come into force on its promulgation by the President or on the expiry of a period of fourteen days from the date of the publication in the Gazette of the final result of the referendum ratifying this Constitution, whichever is the earlier.***
>
> ***Subject to the Sixth Schedule, for the avoidance of doubt, the Constitution in force immediately before the effective date shall stand repealed on the effective date."***

58. Neither of the above provisions expressly provide for its retrospective application with respect to actions that took place under the regime of the former Constitution. Therefore, the applicable law in this suit is the former Constitution and the Employment Act Cap 226, now repealed and not the 2010 Constitution and the 2007 Employment Act.

Whether the disciplinary proceedings ought to have been halted pending conclusion of the criminal proceedings.

59. The Petitioner alleged that Clause 9 of the Respondent's Code of Conduct which allowed the 1st Respondent to take punitive action if the employee charged in a criminal court is acquitted was punitive and led him to suffer double jeopardy. In his view suspension ought to have been a last resort and that the dismissal while the criminal case was going on was a contravention of his right to fair trial as it prejudiced the minds of those hearing his case yet he was supposed to be presumed innocent until proved guilty. However, the 1st Respondent averred that Clause 9 of its Code of Conduct allowed it take any disciplinary action notwithstanding the pendency of criminal proceedings.

60. I have considered Clause 9 of the respondent's Code of Conduct which provides:

> ***"The fact that criminal proceedings have been instituted against an employee shall not preclude taking of disciplinary action for the same offence by the Authority nor shall acquittal in a Court of Law for the same offence deter the disciplinary process in the Authority.***
>
> ***The Authority may be entitled to terminate an employee even when criminal proceedings against him/her in a court of law have not been finalised. The outcome of the criminal proceedings shall not affect the Authority's decision to dismiss an interdicted/suspended employee or impose any other sanction."***

61. Section 62 (1)-(4) of the Anti-corruption and Economic Crimes Act of 2003 which, provides as follows:

> ***"(1) A public officer or state officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case:***
>
> ***Provided that the case shall be determined within twenty- four months.***
>
> ***(2) A suspended public officer who is on half pay shall continue to receive the full amount of any allowances.***
>
> ***(3) The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.***
>
> ***(4) This section does not derogate from any power or requirement under any other law under which the public officer may be suspended without pay or dismissed."***

62. My interpretation of subsection (4) above is that the legislature did not intend to muzzle the exercise of powers to suspend without pay or dismiss an employee under other legal regimes, pending determination of corruption and economic crimes charges. Although the petitioner challenged the legal force of the respondent's Code of Conduct on the basis of the provision of section 27 and 34 of the Interpretation and general provisions Act, I regret to observe that the said provision were repealed in 2013. However, I appreciate the provision of section 31(2) of the Act, which provides that a subsidiary provision shall not be inconsistent with an Act.

63. Having found that Section 62 (4) of the Anti-corruption and Economic Crimes Act of 2003 provides a spillway for disciplinary process to be undertaken by employers under other legal regimes, I proceed to hold that Clause 9 of the respondent's Code of Conduct is not inconsistent with section 62 of the Anti-corruption and Economic Crimes Act of 2003, and therefore the respondent was entitled to take disciplinary action against the petitioner including suspension without pay and even dismissal notwithstanding the pendency of the corruption charges in court.

64. I ascribe to the jurisprudence emerging from this Court and the Court of Appeal that is criminal and disciplinary processes are distinct. The former is founded on criminal law while the latter is founded on the contract of employment between the parties concerned. In fact none of the two binds the other and the standard of proof is different because while in criminal process the standard of proof is beyond reasonable doubt, in the disciplinary process, is balance of probability and for that reason I find Clause 9 of the respondent's code of conduct to be in

consonance with the said jurisprudence.

65. The foregoing view is fortified by **James Mugera Igati v Public Service Commission of Kenya [2014] eKLR** where the Court of Appeal held that:

> ***"…There is nothing in the repealed Employment Act Cap 226 Laws of Kenya, and the Public Service Commission Regulations 2005 which applied to the dismissal of the Claimant from service, that suggest the disciplinary process, is tied to the criminal process that may arise from the same facts. Section 17 of the repealed Employment Act did not make disciplinary proceedings at the workplace subject to any criminal investigations, trial or convictions…"***

Whether the Petitioner's suspension and dismissal was unlawful, unfair, wrongful

66. Having found that the applicable statute is the repealed Employment Act, 226, it is important to point out that under the said repealed act an employer had no obligation to explain to the employee the reasons for dismissal or ensure that there was fair process in the dismissal unless provided under the contract of employment. In **Ezekiel Nyangoya Okemwa v Kenya Marine & Fisheries Research Institute [2016] eKLR** the Court held:

> ***"The Courts have explained that under the old employment law in Kenya, Employers could terminate contracts of employment at will, for good cause, bad cause or no cause. At the time, employment was at the will of the Employer… The Respondent therefore needed to look at the Claimant's contract of employment and the laws governing such contract holistically, before suspending and summarily dismissing the Claimant from service."***

67. The suspension letter dated 22.5.2006 stated that the Petitioner was being suspended in accordance with section 6 B (iv) and (vi) of the Code of Conduct and that he would not earn any salary during the suspension period but was to be paid house allowance. Clause 6B (iv) and (vi) provided:

> ***"The authority may suspend an employee when such an employee:***
>
> ***iv) has been charged with gross misconduct and the question of his dismissal is being contemplated.***
>
> ***…***
>
> ***vi) where the interest of the Authority requires that an employee should forthwith cease to exercise the functions and powers of his/her office and the question of his/her dismissal is being contemplated.'***

68. The Petitioner was charged with a criminal offence, though not instituted by the 1st Respondent but the defunct KACC. The charge was that he solicited for a bribe from a taxpayer, which offence entitles the employer tosummarily dismiss the employee under Clause 4.1 (g) of the Code of Conduct which provides that:

> ***"If an employee commits or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his/her employer or his/her employer's property."***

69. Further, Clause 6B (b) of the Code of Conduct provided that an employee would not earn salary during the suspension period. As already observed herein above, section 62(4) the Anti-corruption and Economic Crimes Act allows the employers to exercise disciplinary powers of suspension without pay under other regimes, notwithstanding the provision for suspension with half pay under subsection (1) thereof. Consequently, I find and hold that the suspension of the petitioner without pay and on the basis of the charges he was facing was lawful and fair.

70. As regards the dismissal before finalization of the criminal charges, Clause 7.9 of the 1st respondent's Code of Conduct provides that:

> ***"An employee found guilty of gross misconduct may be dismissed without notice or pay in lieu of notice…. Employees of grades KRA 1-3 can only be dismissed by the Board of Directors on recommendations of the Commissioner General or the Staff Committee of the Board. All the other employees shall be dismissed by the Commissioner Generally on recommendations of the Disciplinary Committee.***
>
> ***Dismissal of the officers under Suspension/ Interdiction shall take effect from the date of Interdiction/ Suspension."***

71. The above Clause expressly limits the power to dismiss an employee only where he is found guilty of gross misconduct. The meaning of gross misconduct which may lead to summary dismissal is lifted from section 17 of the repealed Employment Act by Clause 4.1 and includes the following:

> ***"(g) If an employee commits or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his/her employer or his/her employer's property."***

72. It follows that the employer herein was required to establish on a balance of probability that the employee is guilty before summarily dismissing him for the alleged misconduct. Logically, the only way to establish the guilt of the employee, the employer must investigate the

allegation to confirm whether indeed the employee has breached its Code of Conduct and terms of his contract of employment to its detriment. The inquiry is not completed without giving the employee an opportunity to defend himself before a Disciplinary Committee or Staff Committee under clause 11 of the Code of Conduct.

73. In this case, Rw1 admitted in evidence that the respondent never did its own investigations into the bribery allegations made against the petitioner but terminated his services on the basis of information that he had been charged in court of law for soliciting a bribe from a Tax payer. Although the petitioner was afforded a hearing before the termination of his services, he contended that the hearing was not fair because he sought for certain information for use in his defence but the employer never availed to him. Rw1 admitted that he was unaware of the petitioner's request for information and whether it was never availed to him before the disciplinary hearing. The only inference to draw from the default to provide the requested information is that either the information was lacking or it was prejudicial to the respondent.

74. It follows that in the absence of any evidence gathered by the 1st respondent to establish the allegation of soliciting a bribe from a tax payer against the petitioner, there was no basis for dismissing him. One would have expected that if the respondent was not willing to investigate the matter, the rational action to take was suspend the petitioner until the outcome of the corruption case.

75. In addition to the said denial of requested information and dismissing the petitioner without evidence of the alleged soliciting of a bribe, the petitioner contended that the dismissal was done by an unqualified person. I have perused the dismissal letter dated 13.9.2006, and confirmed that it was drawn and signed by Mr. M.A. Onyura the Senior Deputy Commissioner but not the Commissioner General as required under clause 7.9 of the respondent's Code of Conduct, *Supra*.

76. The said action was also contrary to section 11 (4) of the Kenya Revenue Authority Act Cap 469 because it was done without the board's prior approval and Gazette notice of delegation of the power to dismiss by the Commissioner General to Mr. Anyura. The said subsection (4) provides that:

> ***"The Commissioner-General may, with the approval of the Board, by notice in the Gazette, delegate any of his powers or functions under this Act or any other written law to a commissioner."***

77. The respondent has not adduced any evidence to prove that the Commissioner-General had indeed delegated his power to dismiss to the Senior Deputy Commissioner HR. It follows that the allegation that Mr. A.M. Anyura lacked capacity to dismiss him has not been rebutted. As already observed herein above, only the Commissioner General had the power to dismiss the petitioner upon recommendation of the Disciplinary Committee under Clause 7.9 and section 11(2) of the Kenya Revenue Authority Act.

78. In reaching the foregoing decision, I have dismissed as misconception, the submission by the 1st respondent that the Commissioner-General had delegated the power to dismiss by appointing Mr. Anyura to the position of Senior Deputy Commissioner HR under section 13(2) of the Kenya Revenue Authority Act. My interpretation of the cited provision is that, the power of the Commissioner-General thereunder is not the power contemplated under section 11(4) of the Act.

79. Having found that no evidence was adduced to prove that the petitioner solicited for a bribe, that he was denied requested information to enable defend himself before the Disciplinary Committee and finally that he was dismissed by an unqualified officer of the 1st respondent contrary to the law and respondent's code of conduct, I must hold, which I do that the dismissal of the petitioner from employment vide the letter dated 13.9.2006 was unlawful and indeed wrongful.

80. As regards the appeal against the dismissal, the Petitioner testified that he appealed against his dismissal on 13.2.2012 but he did not receive any response. The Respondent contended that the appeal was filed out of time since, by dint of the Orders issued in Misc. App, No.493 of 2006, the Petitioner was expected to lodge his appeal by 10.2.2012. Emkule J. in the Ruling delivered on 27.9.2006 held:

> ***"In addition, there is also the open aspect that the Applicant might apply for amendment of the main motion to include a prayer to quash the letter of dismissal. For those reasons, I would grant a stay in respect of the appeal against dismissal pending the determination of the criminal proceedings."***

81. It is common ground that the said criminal case was withdrawn under section 87A of the Criminal Procedure Act on 11.1.2012. Consequently, I agree with the 1st respondent that from the said date of withdrawal to 13.2.2012 when the Petitioner lodged his appeal 30 days required to appeal under Clause 8 (3) of the Code of Conduct had lapsed and as such the appeal filed was time barred and of no consequence.

d. Whether the Petitioner is entitled to the orders sought

82. The petitioner prayed for a declaration that the Respondent's action and/or omission have infringed his constitutional right to fair employment practices. He further sought for declaration that Clause 9 of the respondent's Code of Conduct is unconstitutional. The respondent has denied the claim and urged that the said claims do not meet the competence threshold set out by the High Court in **Anarita Karimi Njeru v Republic [1979] eKLR** when held that:

> ***"We would, however, stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, (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."***

83. The foregoing principles were affirmed by the Court of Appeal in **Mumo Matemu v Trusted Society of human Rights Alliance & Others [2013]eKLR.** Having carefully considered the petition herein, I am in agreement with the 1st respondent that the said claims are not pleaded with precision, the alleged infringement, the constitutional provision alleged to have been infringed, and the manner in which they

were infringed. Consequently, I hold that the said claims have not met the competence threshold required of a constitutional reference claims and they are dismissed.

84. In view of the finding that the dismissal of the Petitioner was done by an unqualified officer of the respondent and that the alleged gross misconduct was not established by evidence, I make declaration that the dismissal was irregular and unlawful. However, I decline to make declaration that the petitioner is deserving of salary, allowances and benefits from May 2006 to December 2015 amounting to Kshs.12, 217,848 for lack of any legal or contractual basis. Such benefits are only availed to an employee in service and not former employees after their dismissal.

85. The petitioner prayed for declaration that he is deserving of damages to be assessed by the Court. Such prayer is vague and it is also dismissed because the court cannot assist a party to plead his claim at this stage. In any event an award assessed at this stage would prejudice the 1st Respondent since it will have no opportunity to challenge it. It is trite law that parties are bound by his own pleadings.

86. In view of the declaration herein above that the his dismissal was unlawful and irregular, I make declaration that the petitioner is entitled to his pension for the years worked in the public service with the respondent less the amount paid after the dismissal.

87. In the end, I enter judgement for petitioner granting the petition in terms of the declarations made herein above. Each party to bear costs.

Dated, signed and delivered at Nairobi this 4th day March, 2021.

ONESMUS N MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE