



**REPUBLIC OF KENYA**

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

**PETITION No. E006 OF 2020**

**GLADYS J CHERONO.....PETITIONER**

**VERSUS**

**THE BOARD OF TRUSTEES NSSF.....1<sup>ST</sup> RESPONDENT**

**CEO MANAGING TRUSTEE NSSF.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner herein was employed by respondent on 9<sup>th</sup> August 1996 as a clerical officer. That, on 27<sup>th</sup> October 2020 while she was off duty she was recalled by a person she referred to as George to report to work. She reported to work as requested and found 6 people namely; George, Joyce Cheptoo Tuya, Cleophas Mochoge, Sharon Chesang, Anne Waithera Mureithi and Geoffrey Obare at the office who were all know to her prior. The said persons allegedly had filed complaints with her employer claiming the petitioner herein had obtained money from them and promised to secure job opportunities for them at NSSF.
2. She averred that she had borrowed Joyce Cheptoo Tuya a sum of Kshs. 100,000/-, Cleophas Mochoge Kshs, 250,000/-, Sharon Chesang a sum of Kshs. 100,000/-, Anne Waithera Mureithi Kshs. 150,000/- while Sharon Chesang was borrowed Kshs. 100,000 which she stated that all were properly document in separate agreement and all were to be refunded in the various times indicated in the loan agreements marked as exhibit GJC-2 to 6 respectively.
3. The petitioner avers that she was shocked when the complainants above made claims that the money she had borrowed was for the purposes of securing employment for them at the respondent's employ, when there was evidence in form of loan agreements duly signed by the separate individual therein.
4. She alleges that the complainants herein have all colluded to and are influenced to lay false, unfounded and malicious claims against her such that instead of claiming their money they resulted to making malicious claims as indicated in the show cause letter.
5. That the following day, CID officers raided her home without search warrant and took with them some documents including the petitioner portrait together with her daughter that was hanging on the wall and confiscated her mobile phone. Further that, ever since the said incident the CID officers would pop up at her house unannounced for unknown reason.
6. She stated that on 30<sup>th</sup> June, 2020 she received a demand letter from Geoffrey Omare's advocates demanding a refund of the money borrowed and due together with collection fees as evidence in the demand letter marked as exhibit GJS-7, which her advocates responded admitting owing the said loan and requested for time to repay the same. Additionally, she stated that in the demand letter by Geoffrey Omare there was no indication that the money advance was for the purpose of securing a job opportunity at NSSF or at all.
7. It was stated that on 2<sup>nd</sup> November, 2020, while the petitioner was at work, she was summoned by the CID to their officer which she obliged and followed them to their officers, where her finger prints were taken and was issued with summons requiring her to appear at the CID officers at a later date which summon notices were extended twice.
8. The petitioner states that the CID officer have on several occasions harassed and intimidated her at her place of work and her residence forcing her to report the issue to the police in fear of her life.
9. She avers that her position at the respondents' employ is that of a clerical officer which is not in any way mandated with recruitment of staff as such the claims by the complainant are unfounded.
10. The petitioner states that it's a result of the complaints made by the complainants above that led to the respondent issuing her with a show cause letter for disciplinary action to be commenced against her.

11. The petitioner is apprehensive that the respondents are working in cahoots with the complaints to frame her of the alleged wrong doings and to have her charged in court as well as dismiss her from employment when the issue herein is on debt owing.
12. She avers that the issues raised in the show cause letter are similar to the issues under investigation by the CID officers. Further that the issues forming the basis of the show cause letter and the issues forming the basis of the intended disciplinary hearing are not related to her employment or alleged fraudulent employment.
13. She therefore sought for this Honorable Court's protection and prayed for the following Orders;
  - a) **A declaration that the act of the respondents serving the petitioner with a notice to show cause on a matter that is under investigations by the DCI is a breach of the petitioner constitutional right under Article, 27(1),(2)(3),28, 41 and 50 of the constitution.**
  - b) **A conservatory order barring the respondents by themselves, their agents, servants and any other person acting under their authority including any government entity, acting under the respondent's authority from harassing, intimidating, summoning and or in any way from subjecting the applicant to parallel proceedings either civil or criminal in nature, over the subject matter herein.**
  - c) **Costs of the petition.**
14. The Petition is supported by the affidavit sworn by the petitioner on 18<sup>th</sup> November, 2020.
15. The Respondents opposed the petition by filing a replying affidavit sworn by the acting section head, employee relations at the National social security fund (NSSF), **Regina Mua** sworn on 12<sup>th</sup> January, 2021 through the firm of G. M Gamma Advocates LLP.
16. The respondents averred that the petitioner was engaged as a clerical officer from 7<sup>th</sup> August 1996 as evidence in the contract of employment marked as respondents' annexure 1. from the said contract, the petitioner ought to abide by the regulations guiding the operation of its employees such as the human resource manual and the leadership and integrity code all annexed herein as annexure 2.
17. It is averred that, on diverse date in the year 2020 the respondents received complaints from members of the public being: Joyce cheptoo tuya, cleophas Mochoge, Sharon Chesang, Anne Waithera Mureithi AKA Mama Wambui and Geoffrey Omare, claiming that the Petitioner had solicited some bribes from them with a promise of securing employment for them with the respondents.
18. It is contended that the respondents served the petitioner with a show cause letter clearly stating the allegation against her, gave her time to prepare her response, and gave her opportunity to explain why disciplinary action should not be taken against her as illustrated in the show cause letter dated 3<sup>rd</sup> November, 2020 marked as annexure 4.
19. It is indicated that the show cause letter clearly enumerates what actions by the petitioner constituted gross misconduct as per section 44 (1) of the Employment Act. Consequently, the Petitioner furnished the respondent with her response by the letter 9<sup>th</sup> November, 2020 marked as annexure 5.
20. It is averred that from the foregoing the respondents have followed due process required by law in subjecting the petitioner to fair administrative action and hearing.
21. The respondents contend that the petitioner has merely stated constitutional provisions and her right but has failed to demonstrate how the said rights have been infringed and or violated by the respondents and the nature and extends of the alleged violations.
22. It is averred that Article 50 of the constitution cited by the petitioner is not applicable to the internal process undertaken by the respondents against the petitioner. Further that, the petitioner has not stated what action was taken by the respondents that violated her right as provided under Article 41 of the Constitution.
23. The respondent averred that this Honourable Court does not have powers to interfere with the employment contract between an employer and an employee or direct the manner in which the said contract is to be performed. Further that the ex-parte injunctive orders issued against them has the effect of undermining and interfering with the respondent's internal decision making process and disciplinary procedures.
24. It is contended that, the Directorate of Criminal investigations inquiries into the alleged accusations leveled against the petitioner for the offence of obtaining by false pretenses are lawful and in accordance with sections 35 and 52(1) of the National police service Act no. 11A of 2011.
25. The respondent avers that the orders sought by the petitioner and seeking to extend the said orders against other agencies such as the ODPP and DCI is unconstitutional as the said entities are creations of the constitution working independently and their mandate ought not to be curtailed by this Honorable Court.
26. The respondents aver that there is no double jeopardy as the petitioner is currently under internal disciplinary process and not criminal trial as alleged. Further that if the petitioner is found culpable she will be subjected to internal disciplinary mechanism as provided for by the respondents' human resource manual.

27. It is alleged that the internal disciplinary hearing has not yet commence against the petitioner, therefore the petition is premature and pre-emptive. In addition, the respondents state that it is only upon conclusion of the hearing of the internal disciplinary process that the petitioner can claim any infringement of her right to fair hearing and fair administrative process and that intervention by this Honourable Court can only be done when the petitioner has justified that the respondents are proceeding in an illegal manner, contrary to the procedure provided by the law.

28. It is stated further that the petitioner has not stated and demonstrated that the procedure followed by the respondents is flawed, neither as she demonstrated how the said constitutional provisions have been violated therefore urged this Court to dismiss this petition for being an abuse of Court process.

29. The Court directed parties to file submissions which the petitioner filed hers on **12<sup>th</sup> February, 2021** and the Respondent filed their on **31<sup>st</sup> March, 2021**.

#### **Petitioner Submissions.**

30. The Petitioner submitted on Two main issues;

**a) Whether the disciplinary proceedings initiated against the petitioner vide the show cause letter dated 3<sup>rd</sup> November, 2020, the subject matter having been reported to the DCI Nakuru for investigation offends the petitioner rights under Articles 27(1),(2),(3), 28,41,47 and 50 of the Constitution.**

**b) Whether the petitioner is entitled to the Courts intervention through remedies as prayed.**

31. **On the first issue;** it was submitted that from the show cause letter, the petitioner required to show cause on allegations of fraudulent employment of the individuals listed in the show cause letter. Further that the petitioner has produced evidence in form of loan agreement showing that that the money she owes all the persons listed in the show cause letter was advanced to her as loan which money was to be refunded which she is in the process of settling as evidence in the further affidavit sworn on 4<sup>th</sup> February, 2021.

32. It was argued that the respondents despite issuing the petitioner with a show cause letter went ahead and made formal criminal complaint at the DCI Officers in Nakuru over the same issue by the same complainants where the petitioner was arrested, detained and arraigned in Court vide criminal case number E132 of 2020 with the offense of obtaining money by false pretenses which was later withdrawn as a result of this Honourable Court Interim Orders, this therefore subjecting the petitioner to Double Jeopardy contrary to the express provisions of Article 50(2)(o) of the Constitution.

33. It was further submitted that, the respondents intended to subject the petitioner to criminal proceedings with the end result of dismissing her from employment. He cited the case of **Mathew Kipchumba Koskei –versus- Baringo Teachers Sacco [2013] eKLR** where the court while faced with instance where the employee was facing disciplinary proceeding with an issue of criminal nature held that;

**“Nevertheless, such circumstances have never ceased to occasion complex considerations that must be taken into account to ensure that justice is done in every individual case. It is the opinion of the court that the following general principles would apply in assessing the individual cases.**

**a) Where in the opinion of the employer the employee’s misconduct amounts to a criminal offence, the employer may initiate and conclude the administrative disciplinary case and the matter rests with the employer’s decision without involving the relevant criminal justice agency.**

**b) If the employer decides not to conclude the administrative disciplinary case in such matters and makes a criminal complaint, the employer is generally bound with the outcome of the criminal process and if at the end of the criminal process the employee is exculpated or found innocent, the employer is bound and may not initiate and impose a punishment on account of the grounds similar to or substantially similar to those the employee has been exculpated or found innocent in the criminal process.**

**c) If the employer has initiated and concluded the disciplinary proceedings on account of a misconduct which also has substantially been subject of a criminal process for which the employee is exculpated or found innocent, the employee is thereby entitled to setting aside of the employer’s administrative punitive decision either by the employer or lawful authority and the employee is entitled to relevant legal remedies as may be found to apply and to be just.**

**d) To avoid the complexities and likely inconveniences of (a), (b) and (c) above, where in the opinion of the employer the employee’s misconduct amounts to a criminal offence, the employer should stay the administrative disciplinary process pending the outcome of the criminal process by the concerned criminal justice agency. In event of such stay, it is open for the employer to invoke suspension or interdiction or leave of the affected employee upon such terms as may be just pending the outcome of the criminal process.**

34. On whether the petitioner has established a case to warrant issuance of the remedies sought, it was submitted that Article 47 of the Constitution of Kenya, guarantees every person an administrative action that is expedient, efficient, lawful, reasonable and procedurally fair. Therefore, subjecting the petitioner to both criminal and internal disciplinary proceedings is tantamount to violation of the petitioner right to fair administrative Action. This argument was buttressed by the case of **Geoffrey Mworira –versus- water resources Management Authority [2015] eKLR** that;

**“The court will very sparingly interfere in the employer’s entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer’s internal process.”**

35. The petitioner finally, urged the court to find that the internal disciplinary proceedings against the petitioner by the Respondent as indicated in the show cause letter and the reasons advanced therein is unfair, unconstitutional and the same ought to be quashed and the respondents barred from proceeding with the internal disciplinary proceedings and or commence any court proceedings against the petitioner with regard to the same subject matter.

#### **RESPONDENT’S SUBMISSIONS.**

36. The Respondent submitted from the onset that the petitioner has not met the threshold for raising infringement of her constitutional rights beyond casual regurgitation of the constitutional provisions, as the petitioner has not demonstrated how the respondents have violated the listed constitutional rights. In this he relied on the case of **Anarita Karimi Njeru –versus- Republic [1979] eKLR** where Justice Hancox and Trevelyan held 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.”**

37. They submitted that the petitioner has not made any effort by particularizing in the petition how the respondents’ internal disciplinary mechanism, which have a statutory underpinning, have resulted in the violation of her constitutional rights. They buttressed their argument by citing the case of **James Makura M’ Abira versus- Director of Public Prosecution [2020] eKLR** where the court held that;

**“the petitioner did not particularize and articulate in the petition the particular right said to have been infringed given the specific Article impinged in respect of each and every allegation of constitutional breach. As the dispute between the parties is one that is solely in the prism of an employment dispute, no constitutional questions arise to elevate the dispute to the rare filed of constitutional petition.”**

38. On the issue of subjecting the petitioner to internal disciplinary process, the respondent submitted that, the decision to issue the petitioner with the show cause letter was informed by the complaints received against the petitioner from the members of the public who alleged to have been duped by the petitioner who allegedly received bribes from them on the promise that she will secure employment for them at the respondents’ employ.

39. The respondents submitted that upon receiving the said complaint it embarked on immediate investigations to establish the truth of the said allegation and whether the said acts violated clause 8.1(a) of their human resource manual. Further that the respondents are empowered under Clause 8.2 of its’ Human resource manual to carry out disciplinary process while at all times observing the principles of fair hearing provided under clause 8.3.

40. The respondents submitted that they established sufficient cause to warrant the issuance of a show cause letter against the petitioner and granted the petitioner an opportunity to be heard and while doing that, they clearly stated the allegations leveled against the petitioner, gave her sufficient time to respond to the allegations and explain the disciplinary actions to be preferred against her therefore if found culpable. Accordingly, the court ought to only interfere with the internal disciplinary process if due process was not followed as held in the case of **MTM –Versus- KIE Limited & Another [2020] eKLR** where the court held that;

**“Courts have held that Courts will interfere with the internal disciplinary action only when the process is flawed. The interference will thus be to be put back on track the disciplinary process but not to do away with it all together.”**

41. Accordingly, the respondents submitted that the petitioner has not alleged that the disciplinary process undertaken by the respondents was flawed or that the opportunity given to her to respond to the allegation leveled against her was unfair whatsoever. They cited the case of **Rosemary Waitherero Mburu –Versus- Kenya Airways Limited [2020] eKLR** where this Honourable court held that;

**“Courts are reluctant to interfere with an employer’s internal disciplinary process unless it is evidently flawed and in breach of the law and such interference will only be limited to putting the process in the right course.”**

42. On the last issue of whether the petitioner was subjected to double jeopardy, the respondent admitted that besides issuing the petitioner with a show cause letter they filed a formal criminal complaint at the DCI Nakuru over the criminal complaints which they submitted that criminal charges that might have been preferred against the petitioner are independent of the respondents’ internal disciplinary process. In this they relied on the case of **Jeremiah Gitau Kiereini –Versus- Capital Markets Authority and the Attorney General [2013] eKLR** where Justice Majanja held that;

**“double jeopardy rule strictly applies to criminal offences and not disciplinary proceedings or proceedings of an administrative nature such as the one concerning the petitioner.”**

43. They thus urged his court to dismiss the petition and the prayers sought therein with costs to the respondents.

44. I have examined the evidence and submissions of the parties herein. The main contention by the petitioner is that the respondents have infringed on her constitutional rights. She wants this court to stop the disciplinary process initiated against her and the criminal proceedings by the police and subjecting her to double jeopardy.

45. The respondent submitted that the petitioner has not met the threshold of initiating a constitutional petition and that she has not demonstrated what constitutional provisions have been infringed upon.

46. In determining this petition the issues for consideration are as follows;

**1. Whether the petition meets the threshold for institution of a constitution petition.**

**2. Whether the act of the respondent in conducting internal disciplinary processes against the petitioner and also reporting her to the police for criminal action is double jeopardy.**

47. On the 1<sup>st</sup> issue, the respondent submitted that the principals enunciated in Anarita Karimi Njeru VS R (1979) KLR 154 have not been met. Indeed in Anarita Karimi's case the Hon. J.J. Hancox & Trevelyan held that;-

**“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.....”**

48. In the current petition, the petitioner has indicated the various articles of the constitution that have been infringed including Article 22, 23, 27, 28, 40, 47, 48 & 50.

49. The petitioner indicated that she feared infringement of Article 47 because she was being subjected to an unfair administrative process.

50. She also indicated Article 50(2) of the constitution was being infringed as she was being subjected to 2 parallel proceedings and this was against the principle of double jeopardy.

51. Article 50 (2) (10) of the constitution provides that an accused person cannot be tried for an offence in respect of an act or an omission which the accused person has previously been either acquitted or convicted.

52. This does not definitely refer to double jeopardy but to the principle of res judicata which is not the case in the current case.

53. In addressing the issue of whether or not the petition then sets out clearly the constitutional breaches I can say that this petition has not set out clearly what constitutional provisions have been infringed upon. The principles in Anarita Karimi Njeru case have not been met in the circumstances.

54. On the second issue, the petitioner complain that she was unprocedurally interdicted and also subjected to an unfair disciplinary process as well as being charged in a criminal court.

55. The petitioner contends that this is unfair and subjecting him to double jeopardy. In MTM V KIE Limited & Another (2020) Eklr, J Wasilwa Case held that;-

**“courts have held that courts will interfere with internal disciplinary action only when the process is flawed. The interference will thus be to put back on truck the disciplinary process but not to do away with it all together...”**

56. In Rosemary Waitherero Mburu VS Kenya Airways Limited (2020) Eklr I reiterated the same principle as follows;-

**“Court are reluctant to interfere with an employer's internal disciplinary process unless it is evidently flawed and in breach of the law and such interference will only be limited to putting the process to the right course.**

**In the case of the Applicant, I find no reason to interfere with the disciplinary process and I therefore find the application without merit. I dismiss this application accordingly”.**

57. On the issue of double jeopardy Jeremiah Gitau Karimi VS Capital Markets Authority and the Attorney General (2013) eKLR J Majanja held that;-

**“The double jeopardy rule strictly applies to criminal offences and not disciplinary proceedings or proceedings of an administrative nature as the one concerning the petitioner”.**

58. In the case of the petitioner the fact of being subjected to internal disciplinary process and also criminal proceedings cannot amount to double jeopardy.

59. In any case, this court has also previously ruled that internal disciplinary processes and criminal processes are two independent processes and therefore can proceed side by side and none can bar the other from proceeding.

60. In the circumstances I find that the petition has no merit and I dismiss it accordingly.

61. There will be no order of costs.

**DATED AND DELIVERED VIRTUALLY THIS 29TH DAY OF APRIL, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Macharia for respondents – present

Claimant – absent

Court Assistant - Fred