



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.E036 OF 2020

TERRY MURINGO MUCHIRI.....PETITIONER

VERSUS

K-REP GROUP LIMITED.....RESPONDENT

JUDGEMENT

Petition

The petitioner is seeking the following orders;

- a) A declaration that the respondent's hacking and deleting of the petitioner's personal emails violated her right to privacy under article 31 (c) and (d) of the constitution;
- b) A declaration that the respondent violated the petitioner's right to dignity under Article 28 of the constitution;
- c) A declaration that the respondent has violated the petitioner's right to fair labour practices under article 41 of the constitution.
- d) A declaration that the termination of the petitioner by the respondent was unfair and unlawful.
- e) An order that the respondent pay the petitioner her terminal benefits of;
 - i. 1 month salary in lieu of notice Ksh.180,330.81
 - ii. Salary for the 20 days worked ksh.180,330.81
 - iii. Compensation for unlawful termination at 12 months' salary ksh.2,163,969.72
 - iv. 78 accrued leave days Ksh.457,762.83
- f) An order that the respondent pay general damages for violation of the petitioner's rights under article 31 of the constitution.
- g) Certificate of service.
- h) *Costs of the suit.*

The petition is that the petitioner is an adult and the respondent is a limited liability company. The petitioner was employed by the respondent under a written contract dated 3rd September, 2012 as an accountant in the department of finance. In 2014 the respondent gave the petitioner additional duties as Finance Manager and in 2016 and without official communication the petitioner were assigned duties of an Officer Manager.

On 17th February, 2020 at 1.30PM the petitioner received letter from the respondent requiring her to show cause on misconduct, misappropriation of funds and falsification of records and an outline of 15 allegations by close of day. The petitioner was kept in her office under duress until 6PM so as to file a response.

By letter dated 18th February, 2020 the petitioner requested for more time and documents held by the respondent so as to defend herself adequately and in response the respondent sent her on leave and to report back on 21st February, 2020 when without prior notice she was

subjected to a disciplinary hearing and committee comprising Prof. Kabiru Kinyanjui, Dr. Francis Kihiko and Kimanthy Mutua and Aleke Dondo. The petitioner was limited in choosing her witness and at the hearing no records and documents were availed to her. The petitioner was then served with letter of summary dismissal.

The petition is that the termination of employment was unlawful and unfair and without due process. In contravention of the Computer Misuse and Cyber Crimes Act, in breach of the petitioner's constitutional rights to privacy, the respondent hacked her personal email address deleting all the emails related to the unfair and unlawful termination process. Despite termination of employment, the respondent has refused to pay terminal dues.

The petition is based on the provisions of Articles 28, 31, 41, 47 of the constitution where the right to dignity, privacy, fair labour practices and fair administrative action have been vacated by the respondent. The respondent has questioned the petitioner's honesty and integrity which is integral in the accounting profession; hacking personal emails and deleting them is in breach of the right to privacy and dignity and contrary to fair labour practices.

There is violation of section 35 and 45 of the Employment Act where the termination of employment was without due process and no Certificate of Service was issued and the orders sought in the petition should issue with costs.

The petition is also supported by the Affidavit of the petitioner which reintegrates the petition and also avers that on 24th February, 2020 she learnt that her emails had been deleted by an employee of the respondent. Majority of these emails pertained to her employment and correspondences on the termination process.

The petitioner also avers that she has information from an IT expert one Jackson Maina that the Google account Gmail is able to trace the IP address from which the emails were deleted. From the Gmail account activity, the emails were deleted on a computer machine whose IP address belongs to the respondent. The respondent, through its employees infringed on the petitioner's right to privacy and tampering with her personal email account without authorisation.

Response

The respondent in response to the petition filed **Replying Affidavit sworn by Kimanthy Mutua** a director who avers that the petitioner was employed by the respondent as an accountant under a contract dated 3rd September, 2012 and with duties which involved the overall management of the finances of the respondent. This included the preparation and management of budget, preparation of financial reports. Management of audits and accounting and book keeping.

In July, 2016 following the resignation of the operations manager and appointment of an accountant the petitioner was appointed the manager and her duties and responsibilities were expanded to those of operations management and supervision of the accountant's work, position she served from 2016 to the date employment terminated. The documents relating to the petitioner's work including board minutes and books are missing and the respondent is seeking these from her.

Mr Mutua also avers that in December, 2019 he was mandated by the board to carry out a staff performance evaluation and make recommendations on salary reviews and to establish the respondent's stability to increase staff salaries and how records were kept. He was to also review the respondent's financial statements and in doing so noted that the accounting records were poorly kept in contravention of accounting principles and errors of dealing with unexplained balances over a long time. There were instances of misclassification of accounting transaction items, accounting statements not agreeing to the trial balance and basic book keeping errors such as preparation of financial reports from outside the ledger.

Mr Mutua also avers that he presented the results of the review to the board and it was recommended that an investigation be carried out to establish the cause of the problem.

Investigations were carried out focused on two accounts; travel and transport Account No.5415 and petty cash Account No.1503 and the findings were that;

- a) Duping cheques signatories to sign blank cheques purporting them to be ordinary office expenses;
- b) Falsifying payment in the ledger by recording amount lower than amount drawn from the bank;
- c) Concealing payments by debiting the accounts payable, without a proceeding charge to the appropriate expense account, thus not disclosing the expenses as is required by conventional accounting principles;
- d) Concealing payments by not recording some payments to Little Limited;
- e) Making payments to Little Limited before receipts, invoices, whereas normally payments are made after receipt and examination of invoices;
- f) Blatant defiance of the board directive that required the petitioner not to incur high costs in travel and transport;
- g) Not using the conventional imprest accounting system as is required;
- h) Causing the respondent to incur disallowable expenses household supplies, groceries, large quantities of drinking water, large

quantities of muffins, chocolates, lunch cash sales and other expenses that are not associated with the office;

- i) Inflating petty cash imprest replenishment and drawing monthly round figures which did not consider unspent balances brought forward from the previous period;
- j) Not fully accounting for the petty cash imprest;
- k) Presenting falsified financial statement to the board of directors.

From the investigations report it was established that there was misappropriation of funds through inflating travel and transport costs and petty cash expenses; incompetent accounting practice; previous board decisions to award bonuses to members and staff were based on incorrect financial statements that indicated inflated surplus hence in breach of trust; and lack of clear policy on approval, checking and verification of expenses which had been exploited by staff.

On further investigations with Little Company and staff it was established that in her assignment, the petitioner as manager had authorised other staff to use Little taxis for their personal trips not related to their work; travel costs attributed to Little taxi had increased significantly from her appointment a manager and went beyond the normal size of operations; the petitioner was using little taxi for personal trips and charging the respondent and the frequency of the trips were not aligned to the nature of respondent's business. The petitioner was found to be using specific Little taxi drivers raising suspicion of collusion for misappropriation of company funds through services which were not genuine and being personal.

Mr Mutua also avers that the investigations concluded that the petitioner should be subjected to a disciplinary hearing and an appropriate sanction be initiated against her. By letter and notice dated 17th February, 2020 the petitioner was directed to show cause and the averment that she was held in the office until 6PM is misleading as she replied to the show cause on the same day at 1619 hours which is within normal work hours.

The petitioner by email of 17th February, 2020 at 1558 hours and a letter dated 18th February, 2020 requested for more time to respond to the notice to show cause. More time was allowed but the petitioner responded on the same day and was advised to bring an employer of own choice and she called Karen Maina to attend at the disciplinary hearing on 21st February, 2020 and which was fair in compliance with the law and the board made a decision to summarily dismiss the petitioner for gross misconduct.

The issues and allegations raised in the petition are misleading as the petitioner failed to adequately and satisfactorily respond to matters made against her relating to gross misconduct and warranted summary dismissal. She was also advised to clear so as to be paid terminal dues but instead of handing over of clearing she made demands over unsubstantiated claims of unlawful termination of employment, damages for breach of privacy and payment for leave days.

The requirement for handing over is not an unreasonable requirement as alleged. The petitioner as the manager should undertake such process. The allegations that her Gmail account was tampered with is misleading and made without proper basis. The respondent has no access to Gmail account to delete the contents and the only email known is the office one being the official account.

The petition is misconceived as constitutional. The dispute between the parties is ordinary and use of constitutional interpretations or alleged violations do not apply.

Upon the petitioner clearing and handing over her duties to the respondent the due terminal dues shall be paid save she continues to hold vital properties and information of the respondent. the petition is therefore premature and should be dismissed with costs.

The petitioner filed her Further Affidavit and avers that she was never issued with formal letter of promotion as alleged by Mr Mutua in reply. All books of account are in the custody of the respondent and who has full control. The alleged investigations was patently unfair to the extent that Mr Mutua was a board member and an independent investigator should have conducted the investigations. He is not a forensic accountant or possess of accountancy competency and being the supervisor there was conflict of interest and the entire process was without notice.

The petitioner also avers that she was not provided with the investigations report before the disciplinary hearing on 21st February, 2020 and the notice to show cause merely listed the allegations without supporting documents as to the source of the allegations made and leading to fictitious findings. The respondent has audited accounts on an annual basis, approved and signed confirmed by the board evidence of proper and correct accounting standards being maintained. The auditors have never raised any accounting malpractice.

The petitioner also avers that her promotion is an indication that her performance was good.

Despite seeking for more time to respond to the show cause notice, this was not alleged. This left her with no option but to respond without the necessary documents. Her nominee to attend at the disciplinary hearing, Nancy Wachira was declined and said to be under disciplinary process based on the same allegations. The alleged gross misconduct was not established.

Upon termination of employment the respondent is legally bound to pay terminal dues and the demands made before payment are unreasonable and the petition should be allowed.

Both parties agreed to address the petition by way of written submissions.

The petitioner submitted that termination of employment was unlawful and unfair and the not justified a there were no valid reasons contrary to section 43 of the Employment Act. the alleged irregular approval of expenditures are unfounded to the extent that the respondent's board proved each expenditure and audits. The alleged investigations report and findings go contrary to audit reports over the years and which are not produced. There was no justification to the findings as held in

Bamburi Cement Ltd v William Kilonzi Civil Appeal No.62 of 2012.

The respondent violated the petitioner's rights to fair labour practices under article 41 and section 41 of the Employment Act. she was not provided with adequate time to prepare her responses or have an employee of choice at the disciplinary hearing as required by law. there was no fair hearing was held in **Rebecca Ann Maina & others v Jomo Kenyatta University of Agriculture & Technology [2014] eKLR**. the petition should be allowed and the petitioner be awarded as prayed with damages for breach of the right to privacy as her personal emails were hacked and deleted contrary to article 31 of the constitution. the petitioner relied on the case of **M W K v Attorney General & 3 others [2017] eKLR** that there is connection to the right to privacy and dignity in so far as it is premised on an individual's entitlement to a sphere of private intimacy and autonomy.

The respondent submitted the petition offends constitutional doctrine of avoidance as the parties were in an employer/employee relationship governed under the Employment Act and the Rules of the court which allow for addressing any dispute through a claim and not a constitutional petition as held in **Communication Commission of Kenya & others v Royal Media Services Limited 5 others [2014] eKLR** and in **Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR** the court held that article 41 of the constitution rights are enacted in the Employment act and which provide adequate remedies and orderly enforcement mechanisms. Filing of a constitutional petition for enforcement of contractual rights is not available under a petition.

The dismissal of the petitioner followed due process and there was a valid reason. The petitioner was invited to show cause and then to a disciplinary hearing with an employee of own choice and where she failed to give satisfactory reasons on the matters put to her to respond. The summary dismissal followed investigations and findings of gross misconduct and under section 44(3) of the Employment Act there was fundamental breach of the employment contract . there is justification of the decision to dismiss the petitioner as held in **George Onyango Akuti v G4S Security Services Kenya Ltd [2013] eKLR** and **Judicial Service Commission v Gladys Boss Shollei Civil Appeal No.50 of 2014** that where a just cause there exists dishonesty, the employer is justified to terminate employment.

There was due process in addressing the petitioner's case. The show cause notice outlined the allegations made and the petitioner responded in writing. The disciplinary hearing was not similar to a court trial requiring service of documents and investigations report as held in **Vincent Ouso Ochuodho v Intercontinental Hotel Ltd [2021] eKLR**.

The alleged breach of the right to privacy is not particularised s required in a constitutional petition and without evidence that the respondent violated such right, the petition should be dismissed with costs.

The petitioner filed further submissions that a constitutional petition caters for all the complex issues that have given rise to the suit and there is no avoidance as alleged by the respondent. there was breach of the right to privacy, dignity and fair labour practices and these can only be addressed in a petition as held in **Munir Sheikh Ahmed v National Bank of Kenya [2018] eKLR**.

The summary dismissal was unfair and unlawful as it lacked substantive and procedural fairness as held in **Walter OGAL Anuro v Teachers Service Commission [2013] eKLR**. the respondent failed to follow the due process of section 41(2) and 44(3) and (4) of the Employment Act. there was violation of the right to privacy and the petitioner is entitled to the orders sought.

Determination

The issues which emerge for determination are;

Whether the petition is proper and if so whether there are constitutional violations;

Whether there was unlawful and unfair termination of employment;

Whether the remedies sought should issue.

The petitioner initiated the proceedings herein through a constitutional petition and asserts that there was an employer and employee relationship but due to the complexity of this matter and invocation of the her rights under the Employment Act, 2007 (the Act) and rights under the Constitution, such can only be canvassed through a petition.

On this admission, proceedings before this court are regulated by the Employment and Labour Relations Court (Procedure) Rules, 2016 and under Rule 7 (1) and (3) requires a party filing a petition to apply the practice directions thereof save a party is at liberty to file a Memorandum of Claim and seek for the enforcement of any constitutional rights violations.

(1) A party who wishes to institute a petition shall do so in accordance with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012.

(2) ...

(3) Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court.

These Rules are imperative to apply as when a party moves the court through a constitutional petition, she is bound by the applicable principles long held in the case of **Anarita Karimi Njeru v Republic** that that a Constitutional petition should set out with a degree of precision the petitioner's complaint, the provisions infringed and the manner in which they are alleged to be infringed.

The issue as to whether rights in employment and labour relations addressed within the contract of employment should be addressed through a petition is addressed by the Court of Appeal in the case of **Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR** that;

It is evident that the petition was hybrid combining violations of various constitutional rights; employment rights under the Employment Act and breach the Public Officers Ethics Act. However, the underlying complaint was the alleged unlawful interdiction and subsequent dismissal of the 1st respondent by the Corporation and appellant. The specific remedies sought were general damages, terminal benefits and issuance of certificate of service. In determining the petition, the ELRC relied wholly on the provisions of Employment Act.

*The **Article 41** rights are enacted in the Employment Act and Labour Relations Act. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1st respondent filed a petition directly relying on the provisions of the Constitution for enforcement of contractual rights governed by the Employment Act without seeking a declaration of invalidity of the provisions of the Employment Act or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of the Constitution.*

*We adopt and uphold the general principle in the persuasive authority in **Barbara De Klerk** (supra) that where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in **Communications Commission** case (supra). (underline added).*

In giving emphasis that parties enforcing employment rights outlined under the Employment Act should file a claim and not a petition, the court in **Francis Atonya Ayeka v Kenya Police Service & another [2017] eKLR** that;

To name the matter herein as a Petition and claim constitutional violations, the facts appurtenant thereto are clear. The cause of action arose in employment where the petitioner is seeking a benefit out of his employment and or service with the respondent. Where a memorandum of Claim was filed or a petition, the cause of action does not change due to the name assigned to the pleadings.

...

a litigant should not avoid the provisions of the Employment Act regarding unfair termination or wrongful dismissal by going behind the statute and seeking to rely directly on Article 41 of the Constitution on the right to fair labour practices. The purpose of the Constitution is that the right to fair labour practices is given effect in various statutes of which the Employment Act and the Labour Relations Act are primary.

The primary legislation should not be circumvented by seeking to rely directly on a constitutional provision. Both the Employment Act and the Labour Relations Act give effect to constitutional rights. ...

The petition herein seeks for declaratory orders with regard to the right to privacy, dignity and fair labour practices anchored on the employment relationship and the payment of terminal dues and damages. The alleged constitutional violations are not particularised with any precision and as outlined above, there exists legislation governing employment between the parties and a clear procedure for redress of any particular grievance prescribed by the Court Rules and that procedure should be strictly followed, thus the petition does not disclose a cause of action anchored on the Constitution. it should be struck out.

Even where the court were to address the claims made, summary dismissal of an employee is allowed pursuant to section 44 of the Act and which requires the employer, with short notice to invite the employee to defend herself pursuant to section 41(2) of the Act. where the employer genuinely finds a good cause to terminate employment for gross misconduct and the motions of section 44 and 41 of the Act are adhered to, such termination of employment is justified.

In the case of **Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] eKLR** the court of Appeal held that;

*Under **Section 43** of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he **"genuinely believed to exist,"** causing him to terminate the employee's services. In the present case, it seems quite clear from the evidence on record that KPLC believed, and had ample and reasonable basis for so believing, that Wasike had attempted to steal cable wire from KPLC stores which he was in charge of. ...*

In this case, the petitioner was dismissed from her employment vide letter dated 21st February, 2020 on the grounds that she presented falsified financial statements with travel and transport costs and concealed the true figures; that she misused or misappropriated funds by incurring or authorising staff to incur excessive costs, using taxis services for unofficial or personal trips; that she defied or ignored directive from the board which specifically required her to ensure travel and transport costs do not exceed Ksh.40,000 per month; and that she failed to

provide effective supervision to the accountant and which resulted in falsification of payments made to Little Limited.

Earlier on 17th February, 2020 the petitioner was issued with a show cause notice requiring her to respond to various allegations with regard to falsification of payments, concealment of payments, omitting payments, making payments to Little Limited, and blatant defiance of the board directive that required her not to incur high costs in travel and transport. The petitioner was also required to respond to allegations of mismanagement and misappropriation of petty cash, playing the board members against each other, poor maintenance of financial records and presentation of falsified financial records.

It is not in dispute that the petitioner requested for two days to respond to the show cause notice and that on 18th February, 2020 she submitted her response which in effect is seeking for supply of records. Of importance to the court is the response by the petitioner is her paragraph 4(i) that;

The last audit was in 2010 considering that deloitte and touché had refused to finish the audit due to incomplete records and huge figures with no supporting documents, unsupported documents, fictitious figures, improper accounting practices among other things and had to change auditors to parckerandall with authorisation from the board with all the mess which I have tried to correct.

The petitioner as the manager at this point comes out as one who well understood the allegations made against her very well. She opted to circumvent the opportunity given to give her in the show cause notice which required that *showing court [cause] as to why disciplinary action should not be taken against you*. The petitioner had notice to respond to matters put to her or risk disciplinary action. The response was made while in office. This is well confirmed by her emails in this regard.

The petitioner was faced with serious allegations and where there was no response, she faced summary dismissal from her employment. the responses made largely dwelt on procedure but not the substantive issues raised against the petitioner. This was a serious omission on her part.

In **Paul Wanyangah v Market Development Trust t/a Kenya Markets Trust [2017] eKLR** the court held that where an employee squanders the opportunity granted for a fair hearing, the employer is justified to terminate employment for gross misconduct as envisaged under section 44 of the Employment Act, 2007. The court held;

Where the employee has the right to a hearing, the employer has the right to terminate the employee upon following due process. Where an employee squanders the chance to be heard the employer cannot be found to have acted unfairly where great effort was taken and is demonstrated to have been applied to have the employee heard but such employee remained adamant and made irrational demands to avoid a hearing.

In **Jennifer Osodo versus Teachers Service Commission [2013] eKLR** where the court held as follows;

...an employee facing disciplinary action cannot be allowed to hold their employer to ransom by taking the position that they will only attend disciplinary proceedings at their convenience. I have examined the facts and circumstances of this case and I am satisfied that the respondent afforded adequate opportunity to the claimant to defend herself but she threw away the opportunity. She stretched her luck to the wire prompting the respondent to dismiss her for desertion of duty. I find both the respondent's action and the attendant procedure justifiable. The claimant's claim for unfair termination of employment therefore fails.

With regard to claims that the right to privacy secured under article 31 of the Constitution, 2010 was violated and such right is linked to the right to dignity and fair labour practices, the petitioner's case is that her personal Gmail account was tampered with by the respondent and her emails deleted. That the deleted emails *related to her employment* and at her paragraph 15 of the Supporting Affidavit avers that;

On 24th February, 2020 I learnt that my emails had been deleted by one of the agents, servant and or employees of the respondent. a majority of the emails deleted were those that pertained to my employment and correspondences on this whole termination process between myself and the respondent.

The petitioner proceeded to attach various emails between herself and the respondent which emails are extracted from her Gmail account and printed on various date after termination of employment. such access to email communications are therefore available and not deleted.

Further, Jackson Maina Affidavit in support of the petition fails to address which email account was accessed and or deleted. The averments that there was a Gmail account whose contents were deleted through a system traced to the respondent's IP address is left bare.

Where an employer allocates an employee work tools and including an email address, such is part of the employer's property and any communications with regard to official business of the employer via such tools remains the assets and property of the employer. Access and dealing with such property cannot be restrained. The property owner has the right to deal as deemed fit and necessary. See **Margaret Wairimu Gacheru v Beta Healthcare International Limited [2019] eKLR**.

Accordingly, the petition as initiated lacks merit and is hereby dismissed; with costs to the respondent. save the petitioner shall attend at the shop floor for clearance and upon which terminal dues shall be tabulated and paid.

DELIVERED IN OPEN COURT AT NAIROBI THIS 29TH DAY OF APRIL, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and