



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PETITION NO. E056 OF 2020

JOHN NJAU MWAURA.....PETITIONER

VERSUS

KENYA POWER & LIGHTING.....RESPONDENT

JUDGMENT

1. Before this Honourable Court for disposal is the Petitioner's Notice of Motion and Petition both dated 21st September 2020 as against the Kenya Power and Lighting Company. In the Notice of Motion dated 21st September 2020 the Petitioner/Applicant seeks for Orders that pending the hearing and determination of the application *inter-partes*, this Honourable Court be pleased to set aside the decision of the Respondent to dismiss him from the position of Technician and order for the reinstatement of his employment at the Respondent. He also seeks that the costs of the application be provided for. The Application is based on the grounds that the Petitioner was dismissed by the Respondent for allegedly being involved in the fraudulent/irregular uprating of transformers at Plast Packaging Industries Ltd & Line Art Solution Ltd and further transacting with a customer and his spouse through MPESA and sharing the proceeds with a colleague. That the Respondent has failed to establish the said allegations whose scope of work was beyond the Petitioner's mandate as a mere Technician and having in any case been transferred to another region at the time of the installation. That the Respondent has also failed to prove that the reason for the termination related to the Petitioner's conduct, capacity or compatibility or was based on the operational requirements of the Petitioner. That 2/5 of the disciplinary committee were people involved in the investigation of the claims made against the Petitioner and that the Respondent did not act in accordance with justice and equity in terminating the employment of the Petitioner. That the termination was meant to eliminate the Petitioner from the employment of the Respondent and premised solely on ulterior considerations and that the Respondent's conduct was unconstitutional as it violates a multiplicity of constitutional values, principles and norms. That it is therefore just and equitable for the orders sought to be granted.

2. To this motion the Respondent filed a Replying Affidavit sworn on 27th November 2020 by its Legal Officer, Emily Kirui. She avers that the terms and conditions of the Petitioner's employment contract(s) clearly stipulated that he was to at all times adhere to the obtaining laws, regulations and the Respondent's code of conduct and/or policies. She refers to the clauses in the Respondent's code of conduct on financial integrity and the authority vested on the officers as a public trust and avers that failure to abide by or meet the Respondent's expectations as in the code of conduct attracted the Petitioner's dismissal on account of gross misconduct. That the petitioner's actions amounted to engaging in corrupt practices and an unethical behavior as he had failed to maintain public confidence in the integrity of his office and further failed to act efficiently and honestly in a transparent and accountable manner. She avers that the process leading to the dismissal of the Petitioner was conducted in a fair and transparent manner and that the Respondent thus honoured the procedural protections accorded to the Petitioner under the law. That the Petitioner has notably had several incidences of indiscipline in the discharge of his duties and has been cautioned and further sanctioned for engaging in serious offences and/or poor performance of his duties. She further avers that the prayers sought in the Petitioner's application cannot be granted in the interim as they would amount to a determination of the main suit without hearing the matter and considering the evidence. She prays that the Application be dismissed with costs.

3. In response to the Respondent's Replying Affidavit, the Petitioner/Applicant filed a Further Affidavit dated 15th February 2020 averring that he had a legitimate expectation that parties within the contract of employment would strictly adhere to the code of conduct in all matters relating to his employment, including reasons for termination if need be. He avers that he was never furnished with the report cited in the replying affidavit and that he is for the first time officially receiving the same from the Respondent. That the Respondent did not also give him the opportunity to cross-examine the said customer on any such allegation and has instead made assertions that were not availed to him during the disciplinary hearing. That the deductive reasoning of the Respondent in the said affidavit is vindictive and does not disclose at what point he committed the offence of gross misconduct. Further, that the Respondent citing his past poor performance at this juncture amounts to double jeopardy since he was punished by not receiving the bonus for that year. The Petitioner/Applicant further avers that the Respondent illegally obtained his Mpesa statements without his consent or knowledge and violated his rights under the Constitution.

4. In the Petition dated 21st September 2020, the Petitioner's averments made in the Petition generally replicate those made in the Petitioner's Notice of Motion dated 21st September 2020. The Petitioner avers that the Respondent in dismissing him from its employment violated Articles 27, 41 and 232 of the Constitution of Kenya and is thus seeking in his Petition for the following remedies:

a) A declaration that dismissal of the Petitioner by the Respondent was a violation of his rights to fair administrative actions and fair labour practices of the Constitution as well as his right to fair labour practices as guaranteed by articles 47 and 41 of the Constitution and the principles of public service as set out in article 232 of the Constitution.

b) An order directing the Respondent to reinstate the employment of the Petitioner as a technician at the Respondent company.

c) An order for compensation for the violation of his rights.

d) An order for the payment of salaries not paid from the months of April 2017 up to the date of the determination of this matter.

e) Costs of an incidental to this Petition.

5. The Petitioner avers that he was employed as a Technician with the Respondent Company on 10th September 1991 and has diligently worked in the said position in several regions of the country. That he got acquainted with Mr. Paul Ngechu Wangaruro, the chairman of the board of directors for Line Art Solutions, in early 2014 while in the line of his duties and that he would often respond to his complaints of power surges in his factory. That he advised Mr. Wangaruro he could assess a viable solution either through installation of a reliever or load follow up power plant to be authorized by his supervisors as his mandate was limited to attending to breakdowns. That when he was transferred to South Nyanza in 2015, Mr. Wangaruro's company was still struggling with the fuse blow ups and overloads but was informed in 2016 that the said issue had been solved by the Respondent. That the said transformers were in any case paid for by Mr. Wangaruro, the customer and the Respondent kept receiving revenue from the said customer and cannot thus claim that they were unaware of the same. That he has since maintained close friendship and become family friends with the said Mr. Wangaruro and his wife Mrs. Mary Ngechu to the extent of advancing money to Mr. Wangaruro through his money lending business called Space Capital Investment. That he and Mr. Wangaruro even went forth to form a self-help group with other friends and have been helping one another during the times of need and that they transacted through Mpesa. It is the Petitioner's averment that he wrote a response detailing his non-involvement in the alleged illegal transactions and the reasons behind his financial transactions with Mr. Wangaruro and his wife and his colleague Ms. Grace Karuiru. That he was not given any further details on the illegality of the installation and/or his involvement in the same and was further unaware of any investigations against him or the Respondent being in possession of his personal bank account records and Mpesa Statements. That he was not allowed to ask questions during the disciplinary hearing and was only queried on his business dealings with his company, Space Capital Investments Limited. That the Respondent did not establish how he as a Technician was personally involved in the procurement process, the approval of the uprating or the installation of the uprated transformers. That the termination was also not done in accordance with fair procedure as averred herein above and that it is in the interest of justice that the same is set aside and he is reinstated back in employment of the Respondent and further compensated for the termination. The Petitioner filed a Supporting Affidavit in support of both his Notice of Motion Application and the Petition. He annexes in his affidavit a copy of the CR.12 for the company Space Capital Investment whose main source of customers he avers are colleagues and friends and that the interests earned from the said loans are the profits for the company. That in 2014 he advanced a loan to one of his colleagues namely Ms. Grace Karuiru and that due to high demand of the loans, he got into an investment partnership with her after she developed interests in the lending business and invested the savings of her husband on their behalf. He annexes copies of bank statements confirming that the said Ms. Grace Karuiru is receiving proceeds of her investment to date.

6. The Respondent's case was articulated in the response to the Petition and the notice of motion. Ms. Emily Kirui responded to the Petition on behalf of the Respondent and averred that sometimes in August 2020 an audit investigation report No. 17-2019/2020 on review of irregular installation of transformers in Nairobi South Region (*annexed as EK-2*) revealed that the Petitioner was involved in the fraudulent/irregular uprating of transformers at Plast Packaging Industries and Line Art Solutions Ltd. That the investigations further established the Petitioner's purported money lending business was a criminal enterprise involving other staff and the owners of Plast Packaging Industries and Line Art Solutions Ltd. That Mr. Paul Wangaruro admitted during the investigation that installation of the 630kva transformer was illegally done with assistance from the Respondent's staff to whom he paid a token of appreciation. That with another staff of the Respondent, Ms. Grace Karuiru being involved, there is no doubt that Space Capital was used as a syndicate in the fraudulent transaction to the detriment of the Respondent. She averred that the Petitioner was asked to show cause why disciplinary action could not be taken against him as a result of the fraudulent activities and his response to the same was considered by the Respondent and found to be unsatisfactory. That a disciplinary hearing was thereafter convened and the Petitioner given appropriate notice to attend a disciplinary hearing on 19th August 2020, and on which day he was granted sufficient and ample time to answer to the charges against him. That the Petitioner's explanations were again unsatisfactory and he was dismissed in accordance with all the relevant laws. She further averred that the Petition is incompetent, bad in law, misconceived and an abuse of the court's process and prays that this Honorable Court dismisses the Petitioner's claims and/or prayers for being unjustifiable and devoid of any merit.

7. The Petition and Notice of Motion were dispensed by way of written submissions. The Petitioner's submissions were to the effect that it is trite law that he who alleges must prove and that his role in the installation of the transformers as alleged by the Respondent remains unclear. That the Respondents further illegally obtained his Mpesa statements without his consent or knowledge and which was in violation of Article 50(4) and Article 31 of the Constitution of Kenya 2010. That such illegally obtained evidence cannot be used herein as proof of the Petitioner's involvement in the alleged syndicate and he asserts that the said Mpesa transactions were solely commercial transactions between his company and Plast Packaging Industries Ltd & Line Art Solutions Ltd. That the Respondent's code of conduct did not bar him from associating with other people or in any way engaging in other economic activities and that the Respondent should show this Court that it was a requirement for all its employees not to have MPESA transactions with its customers. That the Respondent's allegations are largely circumstantial and do not justify its drastic action to dismiss him in the absence of collaborative evidence. In rebuttal, the Petitioner submits that the Respondent did not care to get a handwriting expert to verify whether the handwriting on the said form was that of the Petitioner but instead invoked his name through guesswork as can be evidenced by the use of 'ostensibly' at paragraph 4.4.10 of their report. That the allegation that the customer confessed to have been assisted by a staff member of the Respondent is general in nature and lacks specificity on the names of the said staff who received the said token of appreciation. Further, that at paragraph 4.5.3 of the report, Mr. Wangaruro intimated that he was misadvised by Grace Karuiru and a former employee, John Kennedy Odhiambo whom he paid some token of appreciation after illegal uprating of TX installations. That it is therefore apparent from the foregoing that the Claimant was not involved whatsoever in the alleged illegal transaction as the customer never implicated him in the same and that the Respondent was only determined to get rid of him.

8. The Petitioner submitted that his impugned dismissal by the Respondent violated Article 47 of the Constitution on the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. He cited the case of **Judicial Service Commission v Mbalu Mutava & Another [2014] eKLR** where the Court of Appeal stated that the administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality. He further submits that he had a right to be heard and that the action taken against him was to meet the constitutional test and failure of which renders the said action unconstitutional and void. He also cited the case of **Judicial Service Commission v Gladys Boss Shollei & Another [2014] eKLR** where the Court of Appeal discussed what constitutes the right to fair administrative action. He submitted that the Respondent violated Article 236 of the Constitution by removing him from office and subjecting him to disciplinary action without due process of the law. That it is apparent from the meeting of the disciplinary committee that the Respondent did not proffer any evidence on his involvement in the said scandal nor provide him with any witness statements that had named him in the illegalities. To this end, he cites the case of **Richard Bwogo Birir v Narok County Government & 2 Others [2014] eKLR** and further submits that the committee set up to hear his case was not impartial as its Chair and one member were part of the investigating committee and were thus already convinced by the evidence against him. That the said committee therefore acted as the investigators, the prosecutors and the judge in their own cause and was not independent or impartial as required under Article 50(1) of the Constitution of Kenya. That bias and prejudice have no room in the administration of justice and that one can determine real or apparent bias by ascertaining the circumstances upon which the allegation of bias is anchored; and using the ascertained circumstances to objectively determine the likely conclusion of a fair minded and informed observer, on the presence or absence of reasonable apprehension of bias. The Petitioner submitted that by the Respondent deliberately concealing the full details of the allegations levelled against him violated the national values and principles of governance under Article 10 and his right to dignity, fair labour practices, fair administrative action, due process and fair hearing under Articles, 28, 41, 47, 236 and 50. He further submits that the right to a fair trial is inalienable, non-derogable and protected from abrogation or limitation under Article 25 of the Constitution and urges the Court to allow his Petition as prayed and with costs to him.

9. The Respondent submits that its actions were in accordance to Articles 41, 47 and 50 of the Constitution, Sections 43, 44 and 45 of the Employment Act and other relevant employment policies and rules. The Respondent submitted that clause (h) of the Respondent's code of conduct and ethics addresses the issue on financial liability and provides that "*an employee should not use his office to unlawfully and wrongfully enrich himself, herself or other persons. He/she should not accept a personal loan or benefit, which may compromise him/her in carrying out the duties of his/her office. Financial integrity also involves exercising prudence in one's financial affairs.*" That clause (k) of the Respondent's code provides that an employee shall not cause anything to be done through another person that is in contravention to the Constitution, laws, regulations, standards and lawful directives and that an employee shall not through coercion or otherwise compel another person to engage in wrongful conduct. That clause (g) of the Respondent's code provides that authority assigned to an officer is a public trust which is to be used in the promotion of public good and officers shall be required to take personal responsibility for the reasonable foreseeable consequences of their actions or omissions arising from the discharge of their duties. The Respondent submitted that it has clearly set out in its pleadings the reasons for terminating the Petitioner's contract of employment and which is also captured in his termination letter dated 2nd September 2020 and that the said reasons are valid in terms of sections 45(2)(a) and 44 of the Employment Act 2007. That the Petitioner's offence amounted to gross misconduct within the meaning of section 44(4)(g) of the Employment Act and Clauses h, k, and g of the Respondent's code of conduct and which justified termination of his services. It further submits that it has demonstrated in its pleadings how it complied with Section 41 of the Employment Act by according the Petitioner fair hearing through a duly constituted Committee while the Petitioner has not tendered any evidence showing that he sought for recusal of the same members and the same was denied. On the issue of its compliance with the substantive and procedural aspects of termination of the Petitioner's employment, it urges this Honourable Court to be persuaded by the observations made in the case of **George Okello Munyolo v Unilever Kenya Limited [2019] eKLR**. The Respondent also relied on the case of **Thomas Sila Nzivo v Bamburi Cement Limited [2014] eKLR** where the Court amplified the import of section 44(4)(g) in justifying summary dismissal and further observed that the employer was not required to have conclusive proof of the Claimant's involvement and that it was only expected to have reasonable and sufficient grounds. The Respondent submitted that the remedy of reinstatement is of specific performance in nature, is discretionary and is not to be awarded arbitrarily and that the yardstick for the Court to conclude whether or not reinstatement is viable is provided for under Section 49(4) of the Employment Act. That in the absence of compelling circumstances, this Honourable Court should exercise restraint in forcing an employment relationship which is contractual in nature as it would be difficult or undesirable to enforce the continuance of a 'personal' relationship between unwilling parties. That it must be remembered that the decision to terminate the Petitioner's contract was as a result of misconduct which has adversely affected the trust it had on the Petitioner. That it was necessary to bring up the Petitioner's previous disciplinary record for the Honourable Court to put into consideration and assess prior to issuing any reliefs or remedies in the instant case. The Respondent relies on the decision of the Court in **Kenya Airways Limited v Allied & Aviation Workers Union Kenya & 3 Others, Civil Appeal No. 46 of 2013** where it was stated that reinstatement would amount to a committal to servitude and bondage on the part of the employee and employer respectively. The Respondent further submitted that the Petitioner has not justified the claim for salaries from April, 2017 as the Respondent carefully tabulated his payments for him together with the liabilities to be deducted and which payment he has not challenged. That under Section 27(1) of the Civil Procedure Act, costs follow the event and the Court is given discretion to determine which party will meet the costs and to what extent. That even though in his submissions the Petitioner tactfully wrote off the prayers in his Application as having been spent, the Respondent had by then responded to the said Application and thus deserves the costs as was observed in the case of **Philip Muiruri Ndaruga v Gatemu Housing Co Ltd [2019] eKLR** because the orders sought by the Petitioner in his Application are final and could not have been granted at the interlocutory stage (*see Rajput v Barclays Bank of Kenya Ltd & 3 Others [2004] 2 KLR 393*), the same should be dismissed. Further, the Respondent submitted, since the Petitioner was lawfully terminated, this Honourable Court ought to hold as such and dismiss the Petitioner's suit and/or Petition with costs to the Respondent.

10. The Petitioner's motion and petition were collapsed into one as the two could be disposed of together. As such the orders that will ensue will of necessity determine the Petition with finality. The Petitioner asserts that his rights were infringed and that the Respondent in terminating his services abridged his rights under Articles 27, 28, 31, 41, 50(1) and 232 of the Constitution of Kenya. He sought reinstatement as well since he was of the view the termination having been improper he was entitled to be retained by the Respondent in its employ. The Respondent on its part seeks the dismissal of the motion and petition asserting that the Petitioner was dismissed for cause and that his rights were not infringed upon. The Respondent argued that the Petitioner was found culpable in the illegal connection of its customer and that this was basis for removal from employment and that it would not serve the interests of the Respondent to have the Petitioner returned to his employment.

11. The Petitioner was accused of fraudulent/irregular uprating of transformers at Plast Packaging Industries and Line Art Solutions Ltd and that the Respondent's investigations further established the Petitioner's purported money lending business was a criminal enterprise involving other staff and the owners of Plast Packaging Industries and Line Art Solutions Ltd. The Respondent asserts that Mr. Paul

Wangaruro, a customer whose company was at the centre of the fraudulent scheme admitted during the investigation that installation of the 630kva transformer was illegally done with assistance from the Respondent's staff to whom he paid a token of appreciation. The Respondent asserted that with one other staff member involved, there is no doubt that the Petitioner's company Space Capital was used as a syndicate in the fraudulent transaction to the detriment of the Respondent. The Petitioner was asked to show cause why disciplinary action could not be taken against him as a result of the alleged fraudulent activities. The Petitioner did respond to the allegations vide his letter of 7th August 2020. He stated that his Mpesa transactions were either soft loans to friends or for fundraising for various needs. The Respondent considered his response to the show cause and the Respondent found this explanation to be unsatisfactory. There was a disciplinary meeting convened as evidenced by the minutes of 19th August 2020. The minutes detail the interaction with the Petitioner and despite his assertions that the disciplinary panel was out to fix him the questions put and the answers he gave were from the record duly noted. He did not object to the composition of the panel. He did not present any witness despite the explanation he gave having involved dealings with other persons he named and others he did not name (such as the husband to his colleague Grace). The Petitioner after the hearing was given the minutes and he signed to acknowledge they were a true reflection of the meeting he had. He was thereafter dismissed by the Respondent from its service vide the letter dated 2nd September 2020. The reasons for the dismissal bring the matter to the inevitable conclusion that the reliefs sought by the Petitioner are entirely unjustifiable and the resultant Petition and motion seeking interim relief devoid of any merit. Petition is hereby dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL 2021

NZIOKI WA MAKAU

JUDGE