



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. E013 OF 2021

IN THE MATTER OF ARTICLES 10, 20, 21, 22, 23, 24, 165 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF VIOLATION OF THE PETITIONER'S RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27(1) & (2), 35, 41, 47(1) & (2), 50(1) AND 236 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT AND EMPLOYMENT LAWS OF KENYA

BETWEEN

NATHANIEL LUSIJI SHIBIRA

PETITIONER

v

H.E. WILBUR OTTICHILO

1st RESPONDENT

COUNTY SECRETARY,

COUNTY GOVERNMENT OF VIHIGA

2nd RESPONDENT

VIHIGA COUNTY PUBLIC SERVICE

BOARD

3rd RESPONDENT

RULING

1. Nathaniel Lusiji Shibira (the Petitioner) was appointed as a Chief Sub-County Liaison Officer, Hamisi, in September 2018 by the County Public Service Board, Vihiga (the Board).

2. On or around 24 June 2020, the Board notified the Petitioner of the termination of the appointment.

3. The Petitioner was aggrieved, and on 12 February 2021, he lodged a Petition with the Court alleging that the decision infringed his constitutional rights to due process in terms of Article 236 of the Constitution, rights to fair administrative action by dint of Article 47 of the Constitution, right to equal protection of the law as provided in Article 27 and the right to fair labour practices pursuant to Article 41 of the Constitution.

4. The Petitioner sought the following remedies:

(i) A declaration that the action of the Respondent herein leading to the termination of the employment of the Petitioner violated the rights and fundamental freedoms of the Petitioner as guaranteed under Articles 27(1) & (2), 35, 41, 47(1) & (2), 50(1) and 236 of the Constitution of Kenya.

(ii) An order of certiorari to bring into this Court and quash the decision of the Respondents contained in the letter dated 24/6/2020 terminating the employment of the Petitioner.

(iii) The Respondents be ordered to compensate the Petitioner for violation of the Petitioner's constitutional rights and the amount to be compensated for quantified.

(iv) In the alternative and without prejudice to the above, the Petitioner be forthwith paid terminal benefits as follows:

(a) Gratuity for the entire contract period.

(b) Salary for the remainder of the contract period and/or such period as this Honourable Court will deem fair and just.

(v) Costs of the Petition.

5. Filed with the Petition was an application under a certificate of urgency seeking interim conservatory orders.

6. The Court directed the Petitioner to serve the application and Petition.

7. On 1 March 2021, the Respondents filed a Notice of Preliminary Objection contending that:

(i) The application and Petition dated 4th January 2021 are a waste of this Honourable Court's time and an abuse of the court process.

(ii) The Petition and the chamber summons are touching on the issue of termination of service of an employee whose salary scale falls within the pecuniary jurisdiction of a lower Court.

(iii) The Petition and the chamber summons can be deliberated on at the Senior Principal Magistrates Court in Vihiga.

(iv) The Honourable Court is bereft of the requisite jurisdiction to entertain the Petition or grant remedies sought.

8. When the parties appeared for directions on 2 March 2021, the Court directed the parties to file and exchange submissions on the Preliminary Objection.

9. The Respondents filed their submissions on 16 March 2021 and the Petitioner on 8 March 2021.

10. The Court has considered the application, Petition, Notice of Preliminary Objection and the submissions.

Jurisdiction of Magistrates Court

11. It is correct as contended by the Respondents that all employment disputes wherein the gross pay of the employee does not exceed Kshs 80,000/- should be instituted before the Senior Resident Magistrates Court as provided for under Gazette Notice No. 6024 of 2018.

12. The Gazette Notice delegated to the Magistrates Court some claims which had been reserved to this Court.

13. The delegation was made by the Chief Justice pursuant to section 29(3) and (4) of the Employment and Labour Relations Court Act.

14. However, the Petitioner asserted that pursuant to section 8 of the Magistrates Court Act as read with Article 23(2) of the Constitution, the jurisdiction of the Magistrates Court was limited to claims alleging violations of freedom from torture and cruel, inhuman or degrading treatment or punishment and freedom from slavery or servitude.

15. The Petitioner, therefore, submitted that since the Petition herein raised allegations of violation of employment-related constitutional rights, then the Magistrates Court was divested of jurisdiction.

16. The Supreme Court decision of *Hussein Khalid & 16 Ors v Attorney General & 2 Ors* (2019) eKLR was cited.

17. The Court will agree with the position taken by the Petitioner.

Exhaustion of prior dispute resolution processes

18. Nevertheless, there is another jurisdictional question which the parties did not raise.

19. It is founded upon Article 234(2)(i) of the Constitution, section 77 of the County Governments Act and section 87 of the Public Service Commission Act.

20. Article 234(2)(i) of the Constitution bestows upon the Public Service Commission the function of hearing appeals from decisions by county public service boards.

17. Section 77 provides:

77. (1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in the exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the "Commission") against the decision.

(2) The Commission shall entertain appeals on any decision relating to the employment of a person in a county government, including a decision in respect of—

(a) recruitment, selection, appointment and qualifications attached to any office;

(b) remuneration and terms and conditions of service;

(c) disciplinary control;

(d) national values and principles of governance, under Article 10, and values and principles of public service under Article 232 of the Constitution;

(e) retirement and other removal from service;

(f) ...

(g) ...

(3) An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of the Commission, the circumstances warrant it.

(4) ...

21. The section was the subject of examination by the Court of Appeal in *Secretary, County Public Service Board & Ar v Hulbhai Gedi Abdille* (2017) eKLR.

22. The Court of Appeal stated therein:

There is no doubt that the respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by **Section 77** of the Act. The section provides not only a forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one, specifically tailored by the legislators to meet needs such as the respondent's. In our view, the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance..... Her contention that she disregarded the appeal because it could not afford her an opportunity to question the procedure followed by the appellant is, in our view, without basis because **Section 77** has placed no fetter to the jurisdiction of the Public Service Commission.

23. The decision is binding on this Court.

24. Section 87(2) of the Public Service Commission Act, on the other hand, buttresses section 77 of the County Governments Act. It provides:

A person shall not file any legal proceedings in any Court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from county government public service unless the procedure provided for under this Part has been exhausted.

25. At the core of the Petitioner's grouses is unfair termination of employment and breach of contract, which are regulated by statutory law though he has given the cause of action a tinge of constitutional violation(s).

26. The first port of call for the Petitioner should have been an appeal to the Public Commission of Kenya, a constitutional commission with the duty to uphold and promote the Constitution and its values and principles.

27. The Petitioner approached the Court before exhausting the constitutionally ordained and statutorily prescribed dispute resolution mechanisms.

28. The Petition was premature.

29. The Petitioner should exhaust the appellate dispute resolution processes and move the Court only if the decision by the Public Service Commission is not satisfactory.

30. The Petition is struck out with no order on costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 2ND DAY OF JUNE 2021.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Petitioner Amasakha & Co. Advocates

For Respondents Office of the County Attorney, Vihiga

Court Assistant Chrispo Aura