



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

ELRC PETITION NO.26 OF 2020

(Before D.K.N.Marete)

LAIKIPIA COUNTY PUBLIC SERVICE BOARD.....PETITIONER

VERSUS

THE PUBLIC SERVICE COMMISSION.....1ST RESPONDENT

KENYA MEDICAL PHARMACISTS AND

DENTISTS PRACTITIONERS UNION.....2ND RESPONDENT

AND

LAIKIPIA COUNTY GOVERNMENT.....INTERESTED PARTY

JUDGMENT

This matter was originated by a way of petition dated 14th December, 2020.

The Interested Party in a Replying Affidavit sworn on 16th February, 2021 supports the petition and pray that the same be upheld.

The 1st Respondent opposes the Petition vide a Replying Affidavit sworn on 25th February, 2021 and prays that it be dismissed with costs.

The 2nd Respondent (erroneously referring to herself as 2nd Interested Party), in a Replying Affidavit sworn on 26th February, 2021 posits that this petition fails to meet the threshold in the authority of **Anarita Karimi Njeru vs Attorney General (1979) KLR 54** and prays that it be dismissed with costs.

The Petitioner's case is that she is challenging the proceedings in the matter of an appeal dated 25th October, 2019 before the 1st Respondent and lodged by the 2nd Respondent. This resulted in a decision of the 1st Respondent delivered on 12th August, 2020 and adopted by court on 19th October, instant.

This petition seeks a setting aside of decision of the 1st Respondent hearing on the basis of a misconstrued interpretation of law and facts, manifest bias and unfairness against the petitioner and the interested party in all the proceedings.

The Petitioner's further case is that this decision of the 1st Respondent was arrived at following a flawed and unfair process and was in its self a flawed decision. Moreover, the decision was made with undue regards to facts and law in that the 1st Respondent failed to appreciate that the members for the 2nd Respondent were legally and fairly terminated from employment.

The Petitioner lays down the following as, *inter alia*, the factual basis of the petition;

- That on 24th July, 2019 the 2nd respondent, being a union that represents doctors including those formerly and currently employed by the Petitioner issued and unlawful seven days strike notice threatening to desert the work place unless their demands were met.
- The 2nd Respondent and her members actuated the threats by going on a strike on 3rd June, 2019.

- The Interested Party moved to court vide an application filed on 4th June, 2019 seeking orders, *inter alia*, barring the Respondents (members) from carrying on with the strike.
- These orders were issued in Nyeri ELRC 20 of 2019 in favour of the interested party requiring the 2nd Respondent to call off the strike that was declared unprotected pending determination of the issues at stake before court.
- Despite service of these orders some of the doctors made good their threats and continued to abscond work.
- The Petitioner and Interested Party issued show cause letters together with the court order.
- Some of the doctors refused and or neglected to heed the show cause letters and court orders and were therefore lawfully terminated for failing to be at work.
- The court order was clear cut that the grievant/doctors would face lawful disciplinary action and failure to return to work.
- They therefore exposed themselves to lawful disciplinary action for misconduct.
- Show cause letters dated 10th June, 2019 were issued to the absentee medics in public interest.
- Members of the 2nd Respondent who reported back to work as directed by court were never served with show cause letters and those who responded and expressed a desire to continue working were reinstated.
- That defiant members of the 2nd Respondent were offloaded eleven days after the show cause letters.
- The 2nd Respondent was properly notified of the impending disciplinary action and therefore the dismissals were procedural and fair.
- Section 44 of the Employment Act, 2007 and section 66 of the Public Service Commission Act provide that desertion or absenteeism from work is a ground for summary dismissal.
- The Petitioner was a party to an appeal lodged by the 2nd Respondent before the 1st Respondent seeking reinstatement of her members terminated on grounds of the illegal strike.
- The 2nd Respondent lodged a Judicial Review Application in Nyeri J.R. 9 of 2019 seeking reinstatement but this was thrown out in a consent dated 17th November, 2019.
- The appeal before the 1st Respondent was flawed *ab initio*.
- The 1st Respondent did not set the matter for hearing nor allow the Petitioner to ventilate their cases before the impugned decision. Her numerous issues of unfairness and preliminary objection raised were all grossly ignored.
- The 1st Respondent delivered his decision on 12th August, 2020 directing as follows;
 - a) The decision of the respondents (Petitioner and interested party herein) to summarily dismiss the doctors listed in the appeal dated 25th October 2019, from the Laikipia County Public Service, is hereby set aside.
 - b) The doctors listed in the Appeal dated 25th October 2019 are hereby reinstated to the positions that they held in the Laikipia County Public Service prior to the decision of the respondents to summarily dismiss them on 21st June 2019.
 - c) The doctors listed in the Appeal dated 25th October are not entitled to any remuneration and benefits between the period 3rd June and 20th June 2019 when they participated in a strike that was declared by the court to be unlawful and unprotected.
 - d) The doctors listed in the Appeal dated 25th October are entitled to all their remuneration and benefits, save as otherwise stated in the decision, in the same manner as other members of the appellants who were not terminated.
 - e) The Respondents to pay the doctors listed in the Appeal dated 25th October 2019 all and any withheld remuneration and benefits, save as ordered in this decision, up to and including the date that the respondents shall reinstate them back to the county public service.
 - f) Upon reinstatement, the respondents do continue to pay the doctors listed in the Appeal dated 25th October 2019 in

accordance with their terms and conditions of service.

- The Petitioner and 1st Interested Party disagree with this determination *in toto*.
- This decision was adopted by the superior court in JR 9 of 2019 without a meritorial consideration of the issues at hand.
- The 1st Respondent failed to award the petitioner and 2nd Interested Party an opportunity to be fairly heard and displayed a pre-determined mind even before adjudication commenced.
- The 1st Respondent disregarded and refused to recognize counsel for the Petitioner and Interested Party.
- The Petitioner submits the irregularity of the 2nd Respondent instituting the appeal before the commission instead of each individual grievant filing their own.
- The Petitioner pleads that she did not participate in the 2nd conciliator's meeting or even the decision making process for a determination of the issue by way of written submissions.
- The 1st Respondent allowed herself to indulge the issue of the legality or otherwise of the strike, which issue had been determined by the labour court at Nyeri and was *res judicata*.
- The 1st Respondent failed to address the numerous issues of the Petitioner, including her recusal, a sign of outright bias in favour of a 2nd Respondent.
- The decision of the 1st Respondent would occasion immense fiscal stress on the part of the Petitioner and Interested Party in that it would entail remunerating defiant and errant employees for the period that they absconded work.
- There have been threats of contempt of court by the 2nd Respondent in the event of non-compliance.
- Intrigues galore by the 2nd Respondent in an attempt at back door execution of the decision of the 2nd Respondent.

The Petitioner's other case is that the action of the 1st Respondent amounts the violation of their rights under the Constitution of Kenya, 2010 under Articles 2(1), 2(2), 2(4) and 3 (1). Article 10, 19, 20, 22, 25, 27, 47, 50, 233,249 and 252 of the Constitution. These are variously expressed in the petition.

The Petitioner also seeks to legitimize her case by relying on Section 44 of the Employment Act, 2007 on summary dismissal besides section 4 of the Service Commission Act which compels the commission to, in fulfilling its mandate be guided by the values and principles of public service enshrined in Article 232 of the Constitution.

She prays as follows;

- A. A declaration that the members of the 2nd Respondent who were terminated by the Interested Party and the Petitioner were fairly and legally terminated.*
- B. A declaration that the 1st Respondent conducted the Appeal before the Respondent lodged by the 2nd Respondent against the Petitioner and the Interested Party in an illegal, unlawful, unfair, biased and unacceptable manner causing great prejudice to the Petitioner.*
- C. A declaration that the Decision of the 1st Respondent delivered on 12th August 2020 and adopted by the court is devoid of merit in law and fact.*
- D. A declaration that the Petitioner's rights under Articles 27, 33,47 and 50 of the Constitution have been violated by the Respondent in the conduct of the Appeal before it.*
- E. Mandatory orders quashing all proceedings before the 1st Respondent and its decision thereof issued on 12th August 2020 in the matter of the Appeal dated 25th October 2019 before the Respondent lodged by the 2nd Respondent against the Petitioner and the Interested Party as the same are irreversibly tarnished with bias and unfairness against the Petitioner.*
- F. Costs of this Petition.*
- G. Any such other Orders as this Honourable court shall deem just.*

The 1st Interested Party in support of the Petition associates with the Supporting Affidavit of Timothy Wamiti for the Application and

Petition.

It is her further case that the decision of the 1st Respondent fails for being at variance with the decision of this court which is the superior organ. It should therefore not be allowed to stand.

The decision is also faulty for creating a strange position where the Petitioner is incapable of disciplining the employees and also advocating anarchy at the work place. This was a failure in the interpreting of the law by the 1st Respondent and should now be put right by this court.

The 1st Respondent in her Replying Affidavit sworn on 25th February, 2021 furiously opposes the application.

It is her case that the appeal, the subject matter of this further appeal was filed on behalf of 34 doctors who are members of the 2nd Respondent.

Upon filing of the appeal the Respondent on 12th November 2019, notified the petitioner of the appeal and directed a submission of all records in relation to the appeal including the proceedings thereof leading to the appeal. In response, the petitioner submitted excerpts of minutes of its meetings held on 20th June, 2019.

On 21st January 2020, the Interested Party submitted a replying affidavit which, on the face of it, was in response to a judicial review application that was before court as it stated that it was in response to the applicant's application dated 13th August, 2019 for judicial review order of certiorari, mandamus and prohibition together with the certificate of urgency, statutory statement and verifying affidavit thereof.

The 1st Respondent's County Appeal Committee met and recommended a resolution of the issues through conciliation per Article 252 (1) (b) of the Constitution and Regulation 78 of the Public Service Regulations. This was accepted by both parties.

The 1st Respondent's other case comes out thus;

- It did not consult the 1st Interested Party as its mandate is executed by the County Public Service Board per Section 59 (1) of the County Government Act.
- An independent conciliator was identified and the process started.
- Conciliation did not proceed as the Petitioner withdrew from the process after the interested party sent a letter dated 13th May, 2020 besmirching the 1st Respondent.
- On collapse of the conciliation process, the 1st Respondent issued a notice to the 1st Interested Party to submit documents in support of the appeal. There was no compliance.
- The hearing of the appeal was done through written submissions with warning to the parties to exchange the same *inter partes*.
- The Petitioner and Interested Party neglected all instructions and advice to participate in the write up.
- After going through the appeal, a decision was made on 12th August, 2020.

The 1st Respondent's penultimate case is that the Petitioner was awarded all opportunity to present her case but declined and squandered the same. Further, the decision of 12th August, 2020 was made in consideration of all evidence and data availed to herself. It is a fair and lawful decision made in consideration of the law and procedure pertaining to such appeals and processes.

The 2nd Respondent's case is a denial of paragraph 6 of the Supporting Affidavit of Timothy Wamiti. It is her case that the decision of 12th August, 2020 by the 1st Respondent was to the extent that the termination of the employment of her members was improper.

It is her further case that this decision was adopted as a court order on 19th October, 2020 thereby occasioning the judicial review application known as Nyeri ELRC Judicial Review (MISC) 2 of 2020 and this petition.

The 2nd Respondent faults the decision of their petitioner in termination of the employment of her members thus;

- The members were not awarded adequate time to respond to the show cause letters.
- The entire disciplinary process was unfair, unlawful and irregular.
- The show cause letters were not sent by registered post as is required.
- This court's decision in Nyeri ELRC 20 of 2019 that the 2nd Respondent's Industrial action was illegal and unlawful did not testify the termination of employment of her members without affording them an opportunity to be heard.

- The show cause period was for 2 days and not 10 as required by the law.
- 27 members of the 2nd Respondent were readmitted, reinstated and accepted back to employment irregularly despite responding to the show cause out of time and also having had summary dismissal letters.
- Contravention of Section 41 (2) of the Employment Act, 2007 in her members dismissal.
- The 2nd Respondent filed the judicial review application out of helplessness with a view to protecting her members from harm occasioned by the termination of their employment and imminent replacement.
- That the Petition fails for failing to state the claim with precision and clear reference to constitution violations as enatiated in the authority of Anarita Karimi Njeru.

In all the, the 2nd Respondent also faults the petition and prays that the same be dismissed with costs.

The issues for determination therefore are;

1. Whether the petition is viable and material for sustaining?
2. Whether the petitioner is entitled to the relief sought?
3. Who bears the costs of the cause?

The 1st issue for determination is whether the petition is viable and material for sustaining. The Petitioner in her written submissions dated 29th April, 2021 reiterates her case in support of the petition.

This is through a narration of the issue in dispute and the sequence of events leading to the decision of the 1st Respondent on 12th August, 2020.

The Petitioner and indeed even the Respondent get out of their way to build their respective cases of fair and unfair termination of the employment of the members of the 2nd Respondent. I must admit that this is besides the point at this level.

This is because the petitioner now seeks to challenge the decision of the 1st Respondent and no more. Issues of the merits on lack of it at the disciplinary process all leading to the termination was the subject matter of the appeal and should have been tackled at that level. At this stage, this is belated and does not assist the respective cases of the parties.

The Petitioner, however, comes out clear by faulting the 1st Respondents conduct in refusing to recuse herself from the hearing of the matter. She however fails to establish the default of the 1st Respondent or even subvert or rebut her evidence that at all times, she was unco-operative and failed to pursue and litigate her case despite numerous agitation so to do.

Her claim of the 1st Respondents failure to comply with Section 4 of the Public Service Commission (County Government Public Service Appeals Procedures) Regulations, 2016, does not hold water and fails *in toto*.

The Interested Party in her written submissions dated 13th May, 2021 also supports the petition. She also gets out of her way to recite the story and facts of her case.

This comprises largely of the difficult in implementing the decision of the 1st Respondent due to the expected financial difficulties this is likely to occasion.

This is an interesting scenario. One where the Petitioner launches this suit alleging violations of her constitutional rights in various provisions of the Constitution of Kenya, 2010.

The petitioner has not in any way laid out the basis for the petition. What comes out is a complaint against the decision of the 1st Respondent in a natural case of termination of employment. The constitutional violations alleged by the petitioner are not demonstrated or illustrated in any way. This renders the petition perulous.

It is trite constitutional law and practice that a party alleging constitutional violations must clearly and elaborately demonstrate such violations. This is not the case, or at all, in the instant case.

I agree with the 2nd Respondent that the petition falls short of the requirements in the authority of **Anarita Karimi Njeru vs Attorney-General (1979) KLR 54**. It therefore collapses on its own motion.

I am therefore inclined to dismiss the petition with costs to the Respondents.

DATED AND DELIVERED AT NYERI THIS 19TH DAY OF JULY, 2021.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mr. Odira instructed by Awuor Ramogi & Company Advocates for the Petitioner.
2. Mr. Washika instructed by Wafula, Washika & Associates Advocates for the 2nd Respondent.
3. Mr. Majimbo instructed by Majimbo A.G. & Company Advocates for the Interested Party.
4. Muthuri instructed by State Law Office for the 1st Respondent.