



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**PETITION NO. E083 OF 2020**

**IN THE MATTER OF**

**DENIAL OF RIGHTS, VIOLATION AND INFRINGEMENT OF**

**ARTICLES 1, 22, 23, 28, 41, 47, 48, 50 & 258 OF**

**THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF**

**SECTIONS 3, 4 & 12 OF FAIR ADMINISTRATIVE ACTIONS ACT, NO. 4 OF 2015**

**AND**

**IN THE MATTER OF**

**THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT**

**AND**

**IN THE MATTER OF**

**RULES 7 AND 17 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT (PROCEDURE) RULES, 2016**

**AND**

**IN THE MATTER OF**

**RULES 3(4), 4, 11, 13,19 AND 23 OF THE CONSTITUTION OF KENYA**

**(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE**

**AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF**

**GUIDELINES ON THE BOND FOR TRAINING PUBLIC SERVANTS, 2018**

**AND**

**IN THE MATTER OF**

JAMES MURIITHI NJOGU.....PETITIONER

VERSUS

THE OFFICE OF THE DIRECTOR OF PUBLIC

PROSECUTIONS ADVISORY BOARD.....RESPONDENT

RULING

1. The Petitioner seeks a slew of reliefs against the Respondent. The Petitioner is asserted to be an Advocate of the High Court of Kenya, and that he previously worked as a Senior Prosecution Counsel/Chief County Prosecutor – Kitui County with the Respondent for a period of 6 years. The facts apparent reveal that the Petitioner was employed as a State Counsel II by a letter of Appointment dated 18<sup>th</sup> March 2011 and was attached to the Directorate of Public Prosecutions. He was later confirmed in his appointment by a letter dated 27<sup>th</sup> November 2012. The Petitioner was posted to Kitui as asserted and he avers he established and operationalized the Office of the Director of Public Prosecution, Kitui County Office. He avers that at all times he had a good standing with the employer and his performance was in his words, excellent. He annexed a copy of the 2014 Performance Appraisal Report as proof of this. The Petitioner asserts he was involved in other duties including participating in various committees and task-forces besides performing his normal prosecutorial duties. He cited as an example his work as a joint secretary to the multi-agency task force that dealt with the Anti-Corruption and Economic Crimes cases attached to the Complaints and Compliments Unit. He asserts he was part of the team that drafted the Customer Guidelines Protocols.

2. The Petitioner avers he applied for and was granted approval for study leave to pursue a Master's Degree in Women's Law in 2014 at the University of Zimbabwe. The course the Petitioner attended was fully sponsored by the Norwegian Agency for Development Cooperation (NORAD) to last for a period of 16 months, which included 9 months for coursework and 7 months of independent research. The Petitioner was granted study leave subject to a deduction of 20% of his basic salary during my absence from the office. The Petitioner proceeded to study on 8<sup>th</sup> January 2015 and asserts that upon completion of his coursework, he reported back to full-time duty on 15<sup>th</sup> October 2015. He stated that he was instructed by the DPP to report back to his duty station which was Kitui County Office with immediate effect. The Petitioner asserts that he responded to the Director of Public Prosecutions vide his letter of 6<sup>th</sup> October 2015. The Petitioner asserted that he began serving his bond on 12<sup>th</sup> October 2015. The Petitioner avers that the training bond agreement stipulates that the commencement date of the bond will be the earliest date the employee reports back to the work station after completion of the training. He asserts that in the instant case he reported to full-time duty on 15<sup>th</sup> October 2015. He asserts that despite being in full-time employment from the 15<sup>th</sup> October 2015 he was still being erroneously and illegally deducted 20% of basic salary as training levy and the Respondent refused to cease such deductions despite his requests to do so. He averred that his course of study only lasted for only 9 months and that as per the guidelines on Bond for Training for Public Servants and the Respondent's Human Resource Manual, the bond period for a course of between 6 months up to 12 months is one year. The Petitioner asserts he was expected to redeem his bond by October 2016, which bond obligation was fully redeemed. The Petitioner asserts that having spent 9 months out of the 16 months given, therefore a balance of 7 months, the bond was supposed to be 9 months. The Petitioner asserts that having redeemed his bond obligation he had a legitimate expectation that he would be discharged, which the ODPP has failed and/or neglected to do. The Petitioner asserts that he resigned from the employment of the Respondent on 2<sup>nd</sup> November 2016 to pursue personal interest including academic research and the Respondent accepted his resignation by their letter dated 15<sup>th</sup> October 2019. The Petitioner asserts that despite fully redeeming his bond, on clearance, the Petitioner was shocked to get demand of Kshs. 1,474,980/- from the Respondent and he avers that this is demand has no foundation, it is unreasonable and unlawful, and abuse of public office. The Petitioner asserts that the Respondent's officers' actions prompted by the Human Resource Department are unfair, unlawful, an abuse of public office and are for collateral purposes. The Petitioner avers that the Respondent would go on to publish the matter to the Law Society of Kenya thus violating the Petitioner's rights under Article 31 to confidentiality and a matter purely contractual. He asserts it is in addition unfair labour practice and a breach of Articles 41, 47 and 236 for the Respondent to fail to adhere to the Guidelines on the Bond for Training Public Servants, 2018 by extending the period of the bond without unjustifiable reasons. The Petitioner avers that he was involved in a road traffic accident and confined to a wheelchair and the use of walking aids. He asserts that with a physical disability his earning is severely diminished and he should be treated with dignity and equality by the Respondent and its agents which are state actors.

3. The Petitioner submits that this is a constitutional petition under Article 22 of the Constitution and it attracts remedies under the aforesaid Article. He posits that the remedies at the disposal of a court stream from Article 23(3) which provides for relief for breach of legitimate expectation. The Petitioner argues that the action by the Respondent is not only irrational and unreasonable but lacks basis and is also a breach of legitimate expectation. He asserts that it was his legitimate expectation having served the bond to be discharged and cleared. He submits the actions of the Respondent cannot pass muster under Article 47. He cited the case of **Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR**, where the Supreme Court of Kenya held:-

*“The question of legitimate expectation is drawn from a primary constitutional consideration and its intercept with the principles of fairness and attracts remedies in Judicial Review under Article 47. especially where an aggrieved person had cause to expect that the attendant aspects of fair administrative action would be adhered to...”*

4. He relied on the case of **Rewel Waithaka Gitahi & 2 Others v Kenya Revenue Authority [2016] eKLR** and submitted that the Court is empowered by Articles 10 and 23(4)(a) of the Constitution; to promote the national values and principles of governance as well as develop the law to give effect to rights and fundamental freedoms which includes Article 41,31,47 as pleaded for the Petitioner. He submitted that both of these empowering clauses decry a situation where any right goes without a remedy. He cited the case of **Evans Odhiambo Kidero**

**& 4 Others v Ferdinand Ndungu Waititu & 4 Others [2014] eKLR** and in particular the concurring opinion of Njoki Ndungu SCJ. He thus urged the grant of the prayers sought as well as costs of the Petition.

5. The Respondent opposes the Petitioner's petition dated 6<sup>th</sup> November 2020 and in reply thereto presented the Replying Affidavit sworn by Mediatrix Midecha Rapando on 13<sup>th</sup> July 2021. The Court needs not rehash the contents thereof as the submissions by the Respondent traverse the same sufficiently. The Respondent further submits that the brief facts of the Respondent's case are that the Petitioner is an Advocate of the High Court of Kenya and was indeed an employee with the Attorney General's Office beginning 18<sup>th</sup> March 2011 under the Directorate of Public Prosecutions. On 24<sup>th</sup> February 2014, the Director of Public Prosecutions (DPP) posted the Petitioner to establish and operationalize the Office of the Director of Public Prosecutions, Kitui Office. The Respondent states that the Petitioner applied and was granted approval for study leave to pursue a Masters in Women's Law degree programme at the University of Zimbabwe for one year and four months with effect from 12<sup>th</sup> January 2015 to 30<sup>th</sup> April 2016. The Petitioner filled and signed the training bond forms for public servants where he was bonded at a sum of Kshs. 1,996,640/- for a period of two (2) years. The then Director of Public Prosecutions, Mr. Keriako Tobiko replied to the Petitioner's letter dated 5<sup>th</sup> November 2014 vide his letter dated 21<sup>st</sup> November 2014 approving the course and study leave for a period of 16 months. The Respondent states that in instances of study leave such as this case, the ODPP Human Resource Manual provides that 20% of the basic salary will be recovered for the duration of the course. The Respondent asserts that whilst continuing with the Masters Program, the Petitioner reported back after completion of the course work to undertake field research at Kitui Law Courts which was part of the requirements for the award of the Masters Degree on 6<sup>th</sup> October 2015. Upon his request and to enable him undertake his research, the Petitioner was redeployed at ODPP Kitui vide a letter dated 15<sup>th</sup> October 2015. Meanwhile he was still undertaking his Masters programme until the lapse of the 16 months. The Respondent asserts that per Clause 9.16.2 of the PSC Guidelines on the Bond for Training Public Servants as well as the ODPP Human Resource Manual, the duration of the Masters Programme lasted 16 months hence the Petitioner was bonded for 2 years. The Respondent asserts that the Petitioner however failed to redeem his bond obligation. The Petitioner made a further application seeking course approval to study for a Masters Degree in Law in International Corporate Governance and Financial Regulations at the University of Warwick from 3<sup>rd</sup> October 2016 to 3<sup>rd</sup> October 2017. However, the second request was not approved as he had not served the bonding period of two years since he returned from the last Masters Programme training as stipulated in the ODPP HRM Manual; further he had earlier been granted a course approval and study leave from 12<sup>th</sup> January 2015 to 30<sup>th</sup> April 2016 and therefore this would be a second Masters degree; and finally the Government does not grant approvals and sponsorships for second Masters Programmes. The Respondent asserts that vide a letter dated 2<sup>nd</sup> November 2016, the Petitioner opted to resign in order to pursue his second Masters degree at the University of Warwick without fully redeeming his bond. The Respondent through the head of training provided the bond period not served by the Petitioner as 18 months totalling to Kshs. 1,474,980/-. The Respondent deliberated on the Petitioner's resignation and resolved that the officer's resignation be accepted and he be asked to pay the bond for the period not served thereafter he can be cleared from service. The Respondent asserts that due process was followed as per the bonding guidelines for public Officers in the Public Service on long courses within and outside the country as stipulated in the ODPP Human Resources Manual, 2013. The Respondent asserts that the Petitioner therefore at this juncture cannot be issued with a Certificate of Service since he is required to pay Kshs. One Million, Four Hundred and Seventy-Four Thousand, Nine Hundred and Eighty (Kshs. 1,474,980/-) as clearance for the bonding period not served. The Respondent has no objection to issuing the Petitioner with the Certificate of Service and Clearance Certificate upon payment of the monies owed to the Government by the Petitioner. The Respondent submits that Section 2.4 of the Guidelines on Bonding Public Service Trainees, May 2016 states that, '*An employee who leaves the employing organization before the expiry of the bond period shall be liable to pay liquidated damages to the organization. The damages will comprise the whole amount of the bond. The Bondee and/or Surety will be required to redeem the bond amount in lump sum in case of default. The Government will reduce the liquidated damages in proportion to the length of the bond period served by the bondee (prorated).*' The Respondent submitted that the Petitioner started serving his bond period in May 2016 after the expiry of his study leave on 30<sup>th</sup> April 2016 and therefore he failed to serve the two-year period having resigned on 2<sup>nd</sup> November 2016. The Respondent asserts that it is yet to institute recovery proceedings through the Attorney General for the Kshs. 1,474,980/- before the Chief Magistrate's Court from the Petitioner.

6. The Respondent submitted that as to whether the it has violated any of the Petitioner's rights, it is an established principle that where a party alleges a breach of fundamental rights and freedoms, he or she must state and identify the rights with precision and how the same have been or will be infringed in respect to him. It cited the case of **Anarita Karimi Njeru vs. the Republic (1976-1980) KLR 1272** where the principle is stated thus;

- a) *Constitutional Violations must be pleaded with a reasonable degree of precision.*
- b) *The Articles of the constitution which entitles rights to the petitioner's must be precisely enumerated and how one is entitled to the same.*
- c) *The violations must be particularized in a precise manner.*
- d) *The manner in which the alleged violations were committed and to what extent.*

7. The Respondent cited the case of **Paul Ng'ang'a v DPP & Anor Constitutional Reference No. 483 of 2012** (unreported), where it was held that a party has been unable to particularise how his fundamental freedoms and rights have been violated or are threatened with violation, no favourable orders can issue to such a party. The Respondent submitted that the Petitioner has failed that test and his Petition therefore ought to be dismissed. The Respondent submits that the Petitioner has merely stated his rights under Articles 3(4), 4, 11, 13, 19 and 23 of the Constitution and has not demonstrated specifically how each of the following rights under the espoused Articles has been violated by the Respondent. The due process of asking for the bond amount that is monies due to the Government does not amount to a violation of rights. As to whether the Respondent's actions were fair, legal and undertaken within the prescribed legal provisions and standards of law, the Respondent submitted that the key considerations governing the actions of the Respondent were with regard to the public interest. The Respondent submitted that Article 157(11) of the Constitution stipulates,

*"In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process."*

8. The Respondent submits that the judgment of the Supreme Court of Fiji in the case of **Matalulu versus DPP (2003) 4 LRC 712** set out the grounds upon which the powers of the DPP conferred under the constitution may be subject to review. These were enumerated as:-

- i. In excess of the DPP's Constitutional or statutory powers;*
- ii. Contrary to the provisions of Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and failed to exercise his or her own independent discretion*
- iii. In bad faith*
- iv. In abuse of the process of the court in which it was instituted*
- v. Where the DPP has fettered his discretion by a rigid policy.*

9. The Respondent submitted that the Petitioner has failed to demonstrate that the Respondent lacks the requisite authority, acted in excess of jurisdiction or departed from the rules of natural justice at all in making its decision. The Respondent submitted that the Guidelines on the Bond for Training Public Servants 2016 developed by the Public Service Commission; now repealed by Guidelines On The Bond For Training Public Servants July, 2018 has provisions that give guidelines on the bond for training Public Servants with a view to enhancing the cooperation and understanding between public service organizations and their employees; where the former obtains the benefit of highly skilled employees while the latter acquires skills and knowledge that often benefit them beyond their immediate work environment. It submitted that the rationale for bonding is that bonding is a strategy that ensures trained employees are retained in the Service for a specified period to facilitate utilization of knowledge, skills and competencies acquired while on training. Through bonding, the Government gets value for its investment in training while enhancing capacities and capabilities for efficient and effective public service delivery. The Respondent argued that the general objective of the guidelines is to provide clear procedures to ensure consistency in the application of the bonding process in the Public Service. It submitted that specific objectives of the guidelines are to:

- (i) Ensure uniform and coherent approach to the bonding process;*
- (ii) Provide framework for the implementation and administration of bonding;*
- (iii) Ensure effective transfer of knowledge, skills and competencies acquired during training; and*
- (iv) Provide mechanisms for monitoring and evaluation of the bonding process.*

The Respondent submitted that in respect to the determination of bond period, the Guidelines provide that for more than one year upto two years the bond period is two years. The Respondent submitted that an employee who leaves the employing organization before the expiry of the bond period shall be liable to pay liquidated damages to the organization. The damages will comprise the whole amount of the bond and the Bondee and/or Surety(ies) will be required to redeem the bond amount in lump sum in case of default and the organization will reduce the liquidated damages in proportion to the length of the bond period served by the Bondee i.e. prorated. Any incomplete months will be calculated to the nearest month. The Respondent submitted further that the bond obligation will be deemed to have been discharged when:

- (i) The Bondee completes the bond period;*
  - (ii) The Bondee or Surety (ies) fully redeems the bond;*
  - (iii) The service of the Bondee is terminated by the employer;*
  - (iv) The Bondee is declared permanently incapacitated on recommendation of a medical board; or*
  - (v) The bondee dies.*
- (b) The Bondee and the Surety(ies) shall be notified of the discharge of the bond obligation within 21 days from when she/he completes the bond period or bonded amount is fully redeemed.*

10. The Respondent submitted that none of the above conditions stated in the guidelines has been fulfilled by the Petitioner to allow him to be discharged from the Bond obligation. It submitted that in case of breach as in the instant case; Section 2.9 Breach of Bond Agreement provides;

- i. An employee who fails to comply with the terms of the bond shall be deemed to have breached the agreement and will be required to redeem the bond in full or as pro-rated.*
- ii. Where administrative efforts to redeem the bond fails, the organization shall institute legal action to recover the bond amount. iii. If a Bondee fails to complete a course of training for reasons which cannot be justified, s/he and/or Surety/(ies) will be liable to repay the cost of training incurred.*

The Respondent submitted that the above provisions are the same provisions echoed in the Office of the Director of Public Prosecutions, Human Resource Manual from Section 9.16 to Section 2.9. The Petitioner being a public servant was bound by the same prior to his resignation. The Respondent submitted that the ODP Human Resource Manual states in relation to Certificate of Service at Section 2.22

that a certificate of service will be issued to an employee on request upon retirement, resignation, dismissal or termination of appointment. The certificate shall contain a fair assessment of the employee and will be signed by the Director. The Respondent acknowledges that the Petitioner was its employee and will issue the Certificate upon discharge from the bond obligation. The Respondent submitted that its actions have been within the law and due process has since been followed to the letter taking into account the Constitutional and fundamental rights of the Petitioner. It submitted that the Training Levy deducted between October 2015 and April 2016 amounting to Kshs. 58,226/- was rightfully and lawfully deducted as the Petitioner was by then still undertaking his Masters Degree program. The Respondent asserted that there has been constant communication as shown by annexures and correspondence in both the Petitioner's and Respondent's Affidavits and the filing this suit was extremely unnecessary as it's a waste of the Honorable Court's precious time. The Respondent further submits that Article 10(2) and Article 232 have been upheld by respecting wholly the national values and principles of governance and the values and principles of public service. The Respondent submitted that the Petitioner is a member of the Law Society of Kenya that governs all advocates professionally and ought to be informed of any suits or actions against its members and there is nothing prejudicial in the letter from the Respondent to the LSK that violates Article 31 of the Constitution. That there are no disciplinary procedures pending against the Petitioner with the Respondent having accepted his resignation and the Petitioner is however yet to fulfil his bond obligations. The Respondent submitted that at the time of his resignation, the Petitioner was not a person living with physical disability. The Respondent asserts that the same has never been brought to its attention and the Respondent empathises with his condition. The Respondent prays that on the basis and strength of the foregoing that the petition be dismissed in its entirety with costs to the Respondent as the same is frivolous, vexatious and an abuse of the court process.

11. The matter before me relates to the alleged infringement of the Petitioner's rights. The Court has carefully considered the pleadings, the submissions of parties and the law in coming to this determination. It is common ground that the Petitioner was an employee of the Respondent. Secondly, the Petitioner sought and was granted permission to undertake further studies leading to the award of a Masters Degree from the University of Zimbabwe. It is apparent sometime after return to Kenya the Petitioner left the Respondent's employment by way of resignation. The issue in my view that has to be determined by this Court is whether the Petitioner served his bond, whether the Respondent has violated the Petitioner's rights and what remedies lie, finally what orders on costs issue.

12. The matter of bond is very focal in this Petition. The Respondent and the Petitioner both cited the provisions of the ODPP Human Resource Manual on the same. The bondee is required to serve the terms of the bond where it is provided that for a study exceeding one year six months the bond period is 2 years. The Petitioner's course was for 18 months and as such the bond period was 2 years. The bond period is provided as being the period after the completion of studies. From the correspondence attached it is clear the Petitioner went back to the Respondent's Kitui office on or about 15<sup>th</sup> October 2015. He had been on study leave and was to, in his own words, undertake field research. Field research forms part and parcel of the study for the award of the Masters Degree and as such at this time at Kitui he was still serving the bond. There was no illegality in extracting the 20% study levy though in the view of the Court this issue needs to be robustly litigated as further studies are not a gift to the individual except where the individual fails to adhere to the terms of the bond. The Petitioner was therefore bound to continue in service for 2 years after the completion of his studies. From a quick reckoning he had time to serve on his bond and as such the Respondent would be in order to seek payment of the pro-rated bond sum since the Petitioner has not met the obligations of his bond. The foregoing discourse is indicative that the Respondent has not infringed on the rights of the Petitioner nor has it treated him without regard to dignity by demanding that he serves the Bond he executed. He is inarticulate in his Petition as to what aspects of his fundamental rights have been infringed upon and precisely how the Respondent has infringed on his rights. As such the Petition is one fit for dismissal as no remedies lie. Indeed, it would seem the Respondent is the party wronged. The Petition is dismissed albeit with no order as to costs. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER 2021**

**NZIOKI WA MAKAU**

**JUDGE**