



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.E097 OF 2021

SPENCER SANKALE OLOCHIKE.....PETITIONER

VERSUS

MAASAI MARA UNIVERSITY..... RESPONDENT

AND

TRANSPARENCY INTERNATIONAL KENYA.....1ST INTERESTED PARTY

INSTITUTE OF PUBLIC ACCOUNTANTS OF KENYA.....2ND INTERESTED PARTY

AMNESTY INTERNATIONAL KENYA.....3RD INTERESTED PARTY

RULING

The petitioner made application dated 26th July, 2021 and with support of the interested parties is seeking that the court do issue orders that;

The court be pleased to certify that this petition raises a substantial question of law and warrants reference to the Chief Justice to empanel an expanded bench per Article 165(4) of the Constitution.

The application is supported by the petitioner and on the grounds that under Article 65(4) of the Constitution which raise a substantial question of law should be heard by an uneven number of Judges not less than 3 assigned by the Chief Justice. The petition raises substantial questions of law under the provisions of Article 165(3) ((d) (ii) and touching on the questions that;

a) Interpretation of Article 65 of the Anti-Corruption and Economic Crimes Act 2003 as read with Article 236 of the Constitution on the protection of whistle-blowers against retaliatory actions by their employers.

b) The question of balance between avoidance of retaliatory action against whistle-blowers at work and the employer's right to discipline employees.

c) The development of the law to protect whistle-blowers against victimisation at the place of work.

Other grounds in support of the application are that the questions raised in the petition are matters of general public importance which are open and have not been settled by the court and as such are open and call for debate by an expanded bench and the resulting decision shall transcend the litigation interests of the parties before the court. The questions are novel and present unique facts not covered by any precedent or settled by the law and have a material bearing on the case if addressed either way with regard to the rights of the parties before court.

The questions posed as substantial originate from the pleadings on record and emerge from the sustainable findings of fact which the court must decide for a just and proper decision. There shall be no prejudice suffered where the petition is certified as raising substantial questions of law.

The petitioner also avers that on 17th June, 2021 the respondent acted unlawfully and summarily dismissed him from his employment without due process and in breach of his right to a hearing. The dismissal was as a result of retaliation following his defence of the constitution by whistleblowing corruption at the respondent known as the "Mara Heist" and owing to the public notoriety of the case, his case has the effect on other members of the public who will be afraid to whistle blow to the detriment of public interest.

The petitioner calls on the court to address substantial questions of law and under Article 165(3) (d) (ii) of the Constitution calls for an expanded bench of 3 hence this application.

The respondent in reply filed Notice of Preliminary Objections which has since been withdrawn.

The petitioner submitted that the petition meets the threshold for certification and reference to the Chief Justice to empanel a bench pursuant to Article 165(3) (d) (ii) of the Constitution as the questions raised relates to the balance of right to discipline an employee and also a shield to whistle-blowers pursuant to section 65 of the Anti-Corruption and Economic Crimes Act 2003 on the protection of whistle-blowers against retaliatory acts of the employer. The petition raises the question of the protection of an employee as the place of work and as held in the case of **Okiya Omtatah Okoiti v Anne Waiguru & others [2017] eKLR** the Court of Appeal held that where a case raises public interest issues which are novel and rare, an uneven bench should be empanelled.

The instant petition call for a delicate balance between the right to discipline an employee and a shield to whistle-blowers which are unique facts not addressed in any precedent by the courts. The petition meets the certification criteria under article 165(4) of the Constitution.

The interested parties supported the petitioner with the 2nd interested party submitting that the petitioner is an accountant by profession and while in employment was a whistle-blower upon detection of fraud in the course of his duties and as required under his profession. The petition is therefore about the protection of rights of employees who challenge the conduct of senior staff and then face charges of alleged insubordination. This brings into question the application of the 65 of the Anti-Corruption and Economic Crimes Act 2003 which protects whistle-blowers but who face victimisation at the place of work.

The 2nd interested party also submitted that the petition raises matters beyond the petitioner in the context that a shop steward who advances the rights of other employees at the shop floor and whose role is to inter-face between the employer and employees may face challenge in advancing collective rights yet be face with individual disciplinary cases for doing so which is similar to whistle-blowers. In this context, the court is called to interpret the constitution vis-a-vis section 65 of the Anti-Corruption and Economic Crimes Act 2003 and an uneven bench will expand the law.

The 1st and 3rd interested parties submitted in support of the petitioner and that the petition raises novel and unique facts and the outcome will benefits labour practices for both employees and employer. The link between the Anti-Corruption and Economic Crimes Act 2003 in shielding whistle-blowers and the Employment Act, 2007 on the right to due process is called for interpretation with regard to the balance of rights to discipline an employee at the same time protect an employee who is a whistle-blower for good cause.

The respondent submitted that the petition does not raise any question of law necessitating application of Article 165(4) of the Constitution. This is a pure case of employer and employee who challenges summary dismissal and the attendant procedures and the remedy sought is payment of damage which is not novel.

The alleged violations are with regard to dismissal from employment and the link being created to whistle-blowers does not exist. The allegations made that the petitioner was dismissed for whistleblowing has no evidence since he was promoted after such fact but opted to resign without giving reasons. There is no link that dismissal was as a result of whistleblowing.

The petition has already been certified urgent and further reference to the Chief Justice will only delay the hearing and the application should be dismissed.

Determination

The application by the petitioner is premised on the provisions of Article 165(4) of the Constitution which provides that;

(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

Before certification of a matter for an expanded bench, the court must be satisfied that there exists a *substantial question of law* under cause (3) (b) or (d) of Article 165(4) of the Constitution that;

(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) The question whether any law is inconsistent with or in contravention of this Constitution;

(ii) The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

Article 165(4) read together with sub-article (3) (d) is in reference to the jurisdiction of the Court to hear any question respecting the interpretation of the Constitution.

What then is a substantive question of law necessitating certification of a matter as meeting the threshold of Article 165(4) of the Constitution?

The High Court in the case of **Stanley Livondo v Attorney General [2020] eKLR** in addressing the question as to what constitutes a *substantial question of law* relied on the case of **Santosh Hazari v Purushottam Tiwari [2001] 3 SCC** and the findings that;

A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be substantial, a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law involving in the case there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point rose for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis

A balance of rights based on the facts and circumstances of each case with the ultimate aim to do justice at all stages but avoid unnecessary delays. The attendant principles were then outlined as follows;

- (i) For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;
- (ii) The applicant must show that there is a state of uncertainty in the law;
- (iii) The matter to be certified must fall within the terms of Article 165 (3) (b) or (d) of the Constitution;
- (vi) The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.

The Court of Appeal in the case of **Okiya Omtatah Okiiti & another v Anne Waiguru - Cabinate Secretary, Devolution and Planning & 3 others [2017] eKLR** in addressing a similar question cited the Supreme Court of India which held that;

The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it ... directly and substantially affects the rights of the parties and if so settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably whether it is either an open question in the sense that it is not finally absurd the question would not be a substantial of law.

And in the case of **Okiya Omtatah Okiiti and another vs. President Uhuru Muigai Kenyatta and 4 others, Petition No. 531 of 2015** the High Court that;

... it clear that whether a substantive question of law arises under 165(4) is dependent on the circumstances of a particular case. Furthermore, that the list of relevant factors is not exhaustive and that the presence or absence of one is not necessarily decisive in a particular case. Ultimately, the presiding judge has to exercise his or her discretion on whether, on his or her appraisal of the factual and legal matrix, a substantial question of law arises

In this regard, there must be a good balance to advance the law and the interpretation of the constitution as well as a balance of all relevant factors in each case and based upon which the court must apply its mind the discretion in a judicious manner.

Fundamentally, the **Court** ought not to shy away from its constitutional mandate of interpreting and applying the Constitution. Whereas the Constitution permits certain matters to be heard by a numerically enlarged bench, that is an exception to the general legal and constitutional position and it is in my view an option that ought not to be exercised lightly.

The petitioner moved the court under Certificate of Urgency on 25th June, 2021 seeking various conservatory orders with regard to the respondent's decision to summarily dismiss him on 17th June, 2021 and that there be a prohibition with regard to advertising for the position held by the petitioner.

The core of the petition are various prayers and for the purpose of this instant application, the petitioner is seeking the following;

a) A declaration be and is hereby issued that the petitioner's dismissal violated his constitutional rights to fair hearing (Article 50), right to dignity (Article 28), right to fair labour practices (Article 41), freedom from cruel and degrading treatment (article 29), fair administrative action (Article 47) besides violating Article 236 of the Constitution.

b) Damages for violation of petitioner's constitutional rights under (a) above

c) *A declaration be and is hereby issued that the respondent's summary dismissal amounts to an unfair termination.*

d) ...the key issues addressed in the instant application and grounds thereto that the matter concerns the Interpretation of Article 65 of the Anti-Corruption and Economic Crimes Act 2003 as read with Article 236 of the Constitution on the protection of whistle-blowers against retaliatory actions by their employers; that the question of balance between avoidance of retaliatory action against whistle-blowers at work and the employer's right to discipline employees; and that there shall be a development of the law to protect whistle-blowers against victimisation at the place of work do not form a foundation in the petition. Even where the court were to certify the matter for an uneven bench as sought, and proceed to hear the petition on the merits, such matters would not arise for consideration in the final analysis.

A court should not act in vain even where there are good intentions.

In the case of **Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi [2019] eKLR** the court held that;

No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity.

The maxim that equity, like nature, will do nothing in vain resonates here.

The issues raised in the petition before this Court requires the Court to determine whether the summary dismissal of the petitioner violated the constitution and his rights in employment and whether damages and compensation should be awarded. These in my humble view, are issues that calls for application of well-established principles of interpretation of constitutional provisions and the law.

It is therefore my finding that no substantial question of law arises from the petition.

In the circumstances, I find no merit in Petitioner's application dated 26th July, 2021 and the same is dismissed. Costs shall abide the outcome of the petition.

DELIVERED IN COURT AT NAIROBI THIS 28TH DAY OF SEPTEMBER, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and

The Ruling above was erroneously placed on the cause list for 28th September, 2021 and since it was ready, I proceeded to deliver the same in the presence of the 1st interested party and in the absence of all the other parties.

Taking note, the ruling above has been re-read today, the 7th October, 2021 as scheduled with the parties.

M. MBARU

JUDGE