



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 135 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 13th January, 2020)

AGNES WACU GATOTO.....PETITIONER

VERSUS

KENYA KAZI SERVICES LIMITED.....RESPONDENT

JUDGEMENT

1. The Petitioner filed the Petition herein on 13/12/2018 to challenge her disciplinary process and the breach of her constitutional rights under Articles 27, 29, 35, 41, 47 and 50. She sought the following reliefs:-

a. A declaratory judgment that the Petitioner's right under Article 35 of the Constitution has been violated by the Respondent.

b. An order of mandamus compelling the Respondent to issue her with the duly signed copy of disciplinary panel deliberation to enable her institute the court proceedings as against the Respondent.

c. Costs of the Petition.

2. The Petitioner's case is that in September 2018, she was issued with an invitation letter to a disciplinary hearing to answer to the complaints made against her by her juniors. She attended the hearing and called Jackson Kiilu as her witness. The hearing was concluded and everyone present at the hearing, including her, signed a disciplinary hearing form.

3. The outcome of the hearing was to be communicated in writing within the next 7 days. It is her case that the decision was documented in a document titled 'disciplinary panel deliberations' but the same has never been availed to her despite her request. She avers that such action infringed upon her right to access information.

4. On 10/07/2019, the Respondent filed a response to the Petition contending that several complaints were made about the Petitioner in the course of her employment. They included harassment, discrimination against staff and misuse of resources. As a result of her conduct, other employees threatened to go on strike.

5. Consequently, the Petitioner was called to a meeting on 30/07/2018 to address the issues emanating from her conduct and her relationship with her juniors. Thereafter, she was sent on leave of absence to allow her time to respond to the allegations.

6. It is the Respondent's case that there was a grievance meeting on 16/08/2018 to give the Petitioner the opportunity to respond to the accusations. The Human Resource Consultant and a union representative were present at the meeting and the Petitioner was informed of the allegations levelled against her. However, she declined the invitation to respond and requested to have a week to prepare a response, which was submitted on 22/08/2018.

7. The Respondent avers that it reviewed the Petitioner's response and found that she had not vindicated herself. As such, she was issued with a letter to show cause which she responded to on 28/08/2018. Once again, her response did not satisfactorily address the issues raised. This prompted the Respondent to issue her with a letter for a disciplinary hearing to be held on 10/09/2018. However, the hearing was moved to 11/09/2018 because her representative would not have been available on 10/09/2018.

8. It is the Respondent's case that during the hearing, the Petitioner demanded to have key parties excluded from the proceedings and declined the opportunity offered to listen to additional evidence that was to be provided. After the hearing, the panel indicated that it would forward recommendations to the Respondent's management for considerations and deliberations.

9. The management reviewed the investigations findings and recommendations and made a decision to terminate the Petitioner's

employment on 20/09/2018. The Petitioner was informed of her right to appeal to the Head of Human Resource Kenya, within 7 days. The Petitioner has never appealed the decision. Additionally, the Petitioner cleared with the Respondent and was paid her dues and issued with a Certificate of Service.

10. The Respondent states that the documents requested by the Petitioner did not relate to the termination of her employment as they were a performance bonus letter and an evaluation form. The Respondent is of the position that the Petitioner is on a fishing expedition hence the Petition should be dismissed with costs to the Respondent.

11. The Petition was disposed of by way of written submissions where the Petitioner filed her submissions on 19/09/2019 while the Respondent filed theirs on 17/10/2019.

12. The Petitioner submits that in failing to issue her with a duly signed copy of the disciplinary panel deliberation as requested for in the letter dated 15/10/2018, the Respondent violated her right under Article 35 of the Constitution and hindered her from protecting another right. She relies on the case of **Nairobi Monthly Company Limited vs. Kenya Electricity Generating Company & 2 Others [2013] eKLR.**

13. It was also her submissions that the Respondent's failure to avail the document is a scheme to terminate her employment thus disregarding her right to fair labour practices.

14. The Respondent submits that the Petitioner has failed to demonstrate how her rights have been infringed upon and neither has she set out the particular constitutional violations, hence has failed to meet the threshold set out in rule 10 (2) (c) and (d) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. They rely on the cases of **Anarita Karimi Njeru vs. Republic [1979] KLR 154** and **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR.**

15. The Respondent submits that the Petitioner was issued with all the relevant documents a fact, which has not been challenged. The Respondent further avers that it is only obligated to keep the records stated in Section 73 of the Employment Act and not minutes.

16. It is the Respondent's submissions that the Petitioner was not prejudiced by its actions since the burden of proof in employment matters lies with the employer pursuant to section 43 of the Employment Act. They rely on the case **Jane Achieng & Another vs. University of Nairobi [2015] eKLR** and **Nairobi Law Monthly Company Limited vs. Kenya Electricity Generating Company & 2 Others [2013] eKLR.**

17. The Respondent submits that the deliberations by the management outside the disciplinary hearing are for the exclusive use of its executive team in their decision making. They rely on the case of **Paolo Murri vs. Gian Battista Murri & Another [2000] eKLR** in submitting that the acts complained of are not *ultra vires* or fraudulent hence should not be interfered with.

18. The Respondent urges this Court to award them costs as they have been enjoined to a Petition that is baseless and misguided and forced to defend themselves against the same. They rely on section 27 (1) of the Civil Procedure Act and the case of **Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another [2016] eKLR.**

19. I have examined all the averments and submissions of both Parties. The Petitioner herein contends that she was subjected to a disciplinary process by the Respondent, which, finally led to her dismissal. The Respondent agrees with this proposition.

20. The Petitioner however avers that she has not been supplied with the disciplinary hearing proceedings to enable her assess the fairness of the process.

21. She contends that the proceedings were documented in a document called "disciplinary panel deliberations" and which she avers that the failure to supply her with a copy of the deliberations infringes on her right to access information under Article 35 of the Constitution.

22. Her contention is that these deliberations would enable her seek her protection under the Constitution and that failure to supply the same to her is an infringement of her right to fair labour practice.

23. Article 35(1) of the Constitution provide as follows:-

1) "Every citizen has the right of access to:

a) information held by the State; and

b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

24. The article is clear that every citizen has a right to any information held by another person and required for the exercise or protection of any right or fundamental freedom.

25. In this case, what the Petitioner requires are deliberations made in a meeting that led to her dismissal. The Respondents have not denied that such a meeting ever occurred. The Respondents have also not submitted any prejudice that they will suffer if such deliberations are supplied to the Petitioner.

26. The Petitioner has explained why she needs these proceedings as they would enable her assess any infringement of her rights and enable her make any further necessary steps.

27. It is my finding that the information required will not prejudice the Respondents and the request is fair and necessary. I therefore find that the Petitioner's right to access information have been infringed upon.

28. I order that the Respondent do supply the information sought within 30 days. In default, it would be assumed the information does not exist or if it exists, it is prejudicial to the Respondent.

29. The Respondent will pay costs of this suit.

Dated and delivered in open Court this 13th day of January, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Chepkoech holding brief Kimathi for Respondent – Present

Petitioner – Absent