



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

PETITION NO 6 OF 2017

KEN T. SUNGU.....PETITIONER

VS

KENYA PORTS AUTHORITY.....RESPONDENT

JUDGMENT

Introduction

1. This Petition is predicated on an employment relationship between the Petitioner, Ken T. Sungu and the Respondent, Kenya Ports Authority.
2. The Petition is dated 5th May 2017 and was filed in court on 8th May 2017.
3. The Respondent's Response to the Petition is dated 29th May 2017 and was filed in court on 30th May 2017. The Response is supported by an affidavit sworn by the Respondent's Head of Human Resources, Boaz Ouko.

The Petition

4. The Petitioner states that he was employed by the Respondent in 1988 in the position of Trainee/Cadet Security Officer, stationed at Bandari College.
5. In 1989, the Petitioner proceeded to the Administration Police Training College at Embakasi, Nairobi for a Paramilitary and Administrative Security Drills Course.
6. In 1990, the Petitioner attended Investigations and Prospection Courses at the Criminal Investigation Department subsequent to which he was attached at the then Nairobi City Commission, where he worked in the Investigations Department.
7. In the same year, the Petitioner was transferred to the Inland Container Depot as a Security Officer at the Respondent's Branch in Nairobi where he worked until the year 1995.
8. On 19th June 1990, the Petitioner was appointed as a Prosecutor vide Kenya Gazette Notice Number 2717 of 5th June 1990, with powers to prosecute offences under the Kenya Ports Authority Act.
9. Between September 1993 and January 1994, the Petitioner attended a Security Management Course, Fraud Detection and Prevention and in the year 1995, he was transferred to Inland Container Depot, Kisumu to perform security duties. He was subsequently transferred back to Mombasa.

10. In the year 2003, the Petitioner was seconded by the Respondent to attend a Transportation Security Management Course at Johannesburg, South Africa and in 2004, he attended a Port Facility Security Officer Training at the International Maritime Organisation/Kenya.
11. In February 2007, the Petitioner attended a Port Facility Security Officer Course on enhancing Maritime Security in Eastern and Southern Africa in Maputo, Mozambique.
12. In the year 2011, the Petitioner attended a Course in Disaster Preparedness and Management organised by the National Disaster Committee and World Health Organisation. In February 2012, he attended a U.S Coast Guards Security Management and Crime Prevention Course.
13. In November 2015, the Petitioner successfully completed a U.S.A Customs Border Protection Course on International Seaport Interdiction and Management of Port of Entry and in March 2016, he attended a Course on Productivity Improvement Program.
14. From the foregoing narration, the Petitioner concludes that he has extensive knowledge, skills and understanding in port security, having worked as a Port Security Officer for over 27 years.
15. The Petitioner states that pursuant to the Bandari Savings and Credit Society By-Laws, he was elected as a delegate from the Respondent's Security Department.
16. On 5th November 2016, the delegates from the various departments elected five (5) delegates as interim Board of the Sacco, thereby disbanding the then existing Board. The Petitioner was thereafter elected by the 5 delegates to be the Chairman of the Sacco as from January 2017.
17. On 21st April 2017, the Petitioner received a letter dated 18th April 2017, redeploying him from the Security Services Department with immediate effect. No reason was given for the redeployment.
18. The Petitioner avers that the redeployment was extremely prejudicial to him and was carried out in flagrant breach of the provisions of the Constitution of Kenya.
19. He adds that he had a legitimate expectation that he would work in the Security Department for the entire period of his employment until he reached retirement age and had no desire to work in any other department.
20. The Petitioner claims that the Respondent is in breach of Article 50(1) of the Constitution of Kenya, as the redeployment was unlawful and in total disregard of the rules of natural justice and fairness. The Petitioner further claims that he was denied an opportunity to be heard prior to the decision that was detrimental to his legitimate expectations.
21. The Petitioner also claims that the Respondent violated Article 41 on fair labour practices, by failing to give reasons for the redeployment.
22. The Petitioner adds that the Respondent violated Article 47 while exercising its administrative powers by failing to give the reasons for its drastic decision.
23. The Petitioner avers that the inter-departmental transfer was effected in an unlawful and arbitrary manner since the Respondent failed to appreciate that the Petitioner had no knowledge in Human Resource Management.
24. The Petitioner further accuses the Respondent of violating Articles 2(2) by exercising authority in direct contravention of the provisions of the Constitution; 2 (5) & (6) by failing to adhere to international labour instruments and 10 & 232(1) by failing to apply the national values and principles of good governance and public service.
25. The Petitioner states that he was greatly prejudiced by the transfer as he stood to lose his delegate

position in Bandari Sacco upon which he would be automatically disqualified from the position of Chairman of the Sacco for the following reasons:

- a) That he was elected as a delegate from the Security Department electoral zone and thereby elected as Chairman of the Sacco;
- b) That the inter-departmental transfer meant that he was automatically moved from his electoral zone thereby revoking his delegate position and consequently his chairmanship.

26. The Petitioner seeks the following remedies:

- a) That a perpetual mandatory injunction and/or prerogative order of prohibition do issue restraining the Respondent either by itself through its agents and/or servants from recalling/redeploying/ releasing the Petitioner from the Security Department to any other department;
- b) That a perpetual mandatory injunction and/or prerogative order of prohibition do issue restraining and/or prohibiting the Respondent either by itself or through its agents and/or servants from withholding any payments and/or allocations properly due and owing to the Petitioner;
- c) That the decision of the Respondent to recall/redeploy the Petitioner from the Security Department to any other department be quashed by an order of certiorari;
- d) A declaration that there exists a binding contract between the Petitioner and the Respondent that the Petitioner had a legitimate expectation that he would work in the Security Department.

27. The Respondent further asks for costs of the Petition.

The Response

28. In its Response to the Petition dated 29th May 2017 and filed in court on 30th May 2017, the Respondent admits having employed the Petitioner as a Trainee Cadet Security Officer.

29. The Respondent further admits that the Petitioner had attended various training courses as a Security Officer as pleaded in the Petition.

30. The Respondent states that like any other organisation it periodically carries out organisational reforms and restructuring geared towards improving its operations and the quality of its workforce so as to boost its productivity and successfully achieve its organisational goals and objectives.

31. The Respondent further states that like any other employer, it has been bestowed with prerogatives at the work place to give directions and create policies to ensure that work is done to the satisfaction of the Respondent, which entails having the mandate to allocate work without inhibitions. The Respondent adds that it does not fall on the Petitioner to dictate where he wishes to work.

32. The Respondent avers that it had a duty to inform the Petitioner of his transfer which was done vide letter of redeployment dated 18th April 2017.

33. The Respondent denies being in breach of Articles 41, 47 and 50(1) of the Constitution as pleaded in the Petition since a work transfer is the prerogative of the employer and the Petitioner cannot therefore claim forced transfer.

34. The Respondent avers that the Petitioner has on numerous occasions been cautioned and reprimanded for engaging in activities that are in conflict with the interests of the Authority as well as abusing his

responsibility as an officer entrusted with the responsibility of securing personnel and port facilities.

35. The Respondent further avers that the Security Department is a very sensitive docket that requires personnel not only to possess technical knowledge but also be persons of high moral integrity who can be properly trusted to enforce standards of safety and security

36. The Respondent goes on to state that the Petitioner was redeployed as part of the Respondent's ongoing departmental reforms geared towards enhancing work performance and boosting productivity which was well within the prerogative of the Respondent.

37. The Respondent points out that the Petitioner's employment terms and benefits remained unchanged and the Petitioner could not therefore claim that the transfer was prejudicial to him.

38. The Respondent takes the position that in the event that the Petitioner was dissatisfied with the transfer, the Petitioner ought to have made a written request for review within a reasonable period.

39. The Respondent cites Clause H6 of its Human Resources Manual 2011 as providing a comprehensive procedure on resolution of grievances. The Respondent states that the Petitioner had neither initiated nor exhausted the dispute resolution mechanism and could not therefore claim a breach of fair labour practices and fair administrative action as provided in Articles 41, 47 and 50 of the Constitution of Kenya.

40. The Respondent adds that the Petitioner had failed to demonstrate how the Respondent was in breach of Articles 2(5) & (6), 10 and 232(2) as alleged in the Petition.

41. Regarding the Petitioner's involvement in Bandari Savings and Credit Cooperative Society, the Respondent states that this was the Petitioner's personal decision which comprised a private and personal interest.

42. The Petitioner avers that the Petitioner's refusal to take up a transfer on the basis that he would lose his position in the Sacco was itself in breach of Article 75(1) (a) & (b) of the Constitution of Kenya and Section 12(1) of the public Officer Ethics Act which restrain public officers from compromising public interest in favour of personal interest.

43. The Respondent asks that the Petition be dismissed with costs.

Findings and Determination

44. In a petition such as the current one, the first issue to determine is whether constitutional issues have been raised.

45. In its final submissions filed on 23rd October 2019, the Respondent made reference to the High Court decision in ***Bernard Murage v Fineserve Africa Limited & 3 others [2015] eKLR*** where **Lenaola J** (as he then was) reiterated the principle that not every violation of the law raises a constitutional issue, adding that where there exists an alternative remedy under statute, then such statutory remedy ought to be pursued in the first instance.

46. The Respondent submits that this is purely an employment dispute founded on a contract of service between the Petitioner and the Respondent, which ought to have been served under the Employment Act, Kenya Ports Authority Act and Staff Regulations in force.

47. The principles restated in ***Bernard Murage v Fineserve Africa Limited*** (supra) remain good law. I think however, that rights arising out of an employment contract could well raise constitutional questions. The basic test as to whether a petition raises constitutional issues is found in the celebrated case of ***Anarita Karimi Njeru v R [1997] KLR, 124*** and it is this; that the petitioner has stated with reasonable precision the right(s) or freedom(s) in issue and described how the right(s) or freedom(s) have been violated.

48. The Petitioner states that his redeployment was in violation of Article 50(1) of the Constitution because he was not allowed a prior opportunity to be heard.

49. He adds that by failing to give reasons for the redeployment, the Respondent had violated Article 41 on fair labour practices.

50. The Petitioner also accuses the Respondent of violating Article 47 on fair administrative action.

51. Based on these pleas, the Court is satisfied that the Petitioner has satisfied the requirements of *Anarita Karimi Njeru* (supra). The Petition is therefore properly before the Court.

52. That settled, the next question to ask is whether by transferring the Petitioner from the Security Department to the Human Resource Department, the Respondent violated any of the Petitioner's rights.

53. The Respondent submits that as an employer, it had the prerogative to redeploy the Petitioner. In advancing its position in this regard, the Respondent relies on the decisions in *Henry Ochido v NGO Co-ordination Board [2015] eKLR* and *James Sande Amuyeka & 6 others v Super Foam [2015] eKLR* where the employer's prerogative to transfer employees was affirmed.

54. The Respondent further relies on Clause A. 3(a) of its Human Resource Manual, 2011 which contemplates redeployment of staff.

55. On his part the Petitioner submits that his redeployment was unreasonable. He relies on the persuasive decision in *Guvava v Traffic Safety Council of Zimbabwe (73/07) [2009] ZWSC 5* where it was held that the employer's discretion to transfer an employee from one place to another should not be readily interfered with except for good cause, which would include unfounded allegations, victimisation and any action which disadvantages the employee.

56. The Petitioner accuses the Respondent of victimising him on several occasions by making unwarranted and unfounded accusations, resulting to disciplinary action against him. The Petitioner terms the Respondent's actions as an attempt to smear his character and paint him as a risk in the Security Department, thus lending credence to the decision to push the Petitioner out of the Security Department.

57. The Petitioner points out that he was disadvantaged as the transfer undermined his professional undertaking in view of his professional qualifications, experience and training as a Security Officer.

58. No doubt, an employer's prerogative to deploy its workforce to meet operational requirements should not be disturbed. However, when it is alleged that this prerogative is being used for collateral purposes, as in this case, the Court must raise its antennae.

59. There is a paragraph at page 2 of the Respondent's written submissions that caught the attention of the Court. It bears reproduction:

"In the Respondent's affidavit in support of the response to the petition deposed by Mr. Boaz Ouko stated in paragraphs 7-10, that the Petitioner had on several occasions been severely cautioned and reprimanded for engaging in activities that are in conflict with the Respondent's interest as well as abusing his responsibility as an officer entrusted with the responsibility of securing the safety of personnel. The organization therefore had various ways to deal with that which involves giving him a second chance without being punitive, he still has the opportunity to earn his salary and all fringe benefits appertaining to employment while utilising his skills elsewhere. It is on this basis that the Respondent exercised its prerogative to transfer the Petitioner to a different department which will allow him to put his skills to good use."

60. I have seen the affidavit sworn by the Respondent's Human Resources Manager, Boaz Ouko in support of the Response to the Petition. His averments at paragraph 7 of the affidavit are properly captured in the Respondent's submissions reproduced above.

61. In addition, at paragraph 8 of his affidavit, Ouko depones:

“I am aware that the Security department is a highly sensitive department and requires officers working there to be people of high integrity who can be trusted with safety and security of personnel and the Respondent’s facility. It is not just enough for an employee to be technically trained in that area.”

62. From the foregoing, it is evident that the Petitioner’s transfer from the Security Department to the Human Resource Department was informed by allegations that attacked the Petitioner’s integrity and suitability to work in the Security Department.

63. The Petitioner submits that he was not given an opportunity to respond to any of these allegations prior to his redeployment. The substance of the allegations was not made known to the Court. At any rate, if indeed such serious allegations had been made against the Petitioner, the correct course of action would have been to subject him to a disciplinary process, not to transfer him.

64. To suggest that an employee who has integrity issues is unsuitable for one department but suitable for another is to turn the receiving department into a dumping ground for ‘*bad apples*’. I find nothing in law, corporate governance or human resource practice that would support such a proposition.

65. In his Petition, the Petitioner sets out a detailed record of his training, exposure and experience in security, spanning over 27 years. The Respondent did not contradict this record. By transferring the Petitioner from the Security Department to the Human Resource Department, the Respondent effectively cut short the Petitioner’s long career path in security. Such drastic action, would obviously have an adverse impact on the Petitioner’s career growth and development.

66. The employer’s prerogative to deploy and transfer employees is well secured. However, that prerogative must be exercised for pure reasons to meet the operational needs of the employer. If as in this case, it is exercised for collateral reasons, the Court must intervene.

67. Consequently, I make the following orders:

- a) The Respondent’s decision to transfer the Petitioner from the Security Department to the Human Resource Department is hereby quashed;
- b) The Respondent is directed to redeploy the Petitioner back to the Security Department forthwith;
- c) The Respondent will meet the costs of this Petition.

68. These are the orders of the Court.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 6TH DAY FEBRUARY 2020

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JUDGE

Appearance:

Mr. Nyongesa for the Petitioner

Mrs. Ikegu for the Respondent