



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 56 OF 2015**

**IN THE MATTER OF: CONTRAVENTION OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ALLEGED BREACH OF RIGHTS AND FUNDAMENTAL FREEDOMS**

**AND**

**IN THE MATTER OF: ARTICLES 22(1) AND 23 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ETHICS AND ANTI-CORRUPTION COMMISSION ACT**

**BETWEEN**

**ROBERT KARANI.....PETITIONER**

**v**

**ETHICS AND ANTI-CORRUPTION COMMISSION.....RESPONDENT**

**JUDGMENT**

**Background**

1. Robert Karani (Petitioner) was offered employment as an Operations Assistant through a letter dated 23 June 2005 by the Kenya Anti-Corruption Commission. The Kenya Anti-Corruption Commission was succeeded by the Ethics and Anti-Corruption Commission (the Commission). At the time, the Petitioner was a Senior Sergeant of Police.
2. The tenure of the contract was 3 years renewable by mutual consent, upon satisfactory performance.
3. It was an express term of the offer that the Petitioner would not resign from the *public office* he was holding before the appointment.
4. The Petitioner took up the offer and was appraised in 2006, 2008 and 2010, scoring a minimum of 80% in the performance evaluation(s).
5. However, in 2010 the Petitioner had work-related issues with one of the Commission's Principal Administrative Officers over his use of an official vehicle (involved in an accident) culminating in the Petitioner suing the said individual for defamation (Nairobi High Court Civil Case No. 105 of 2011).
6. In 2011, the Ethics and Anti-Corruption Commission Act was enacted and it commenced on 5 September 2011.
7. Pursuant to the provisions of section 34 of the Act, employees of the predecessor Commission who were on contract and/or secondment were deemed to be employees of the Commission for the unexpired period of their contracts. They were, however, to be subjected to vetting.
8. As part of the transition and changes and because the Commission was not yet lawfully and validly constituted, the Ministry of Justice,

National Cohesion and Constitutional Affairs offered the Petitioner the position of Operations Assistant 1 through a letter dated 11 September 2012, but deployed to the Ethics and Anti-Corruption Commission (backdated to 8 August 2012).

9. The contract was for 12 months but subject to further decision by the Commission.

10. In the meantime, on 3 January 2013, the Commission wrote to the Petitioner informing him that the question regarding the motor vehicle accident would be laid to rest, but that it had been noted he had not formally informed the Transport Officer of the accident.

11. On 18 January 2013, the High Court delivered judgment in the Nairobi High Court Civil Case No. 105 of 2011 (in which the Petitioner had sued one of the Commission's Principal Administrative Officer). The Petitioner was awarded damages.

12. The decision of the High Court must have raised alarm within the Commission's ranks, for on 15 March 2013, the Commission's Human Resource Manager wrote a letter to the Petitioner reminding him of the need to utilise and exhaust internal grievance resolution mechanisms before resorting to external mechanisms.

13. During this particular time, the vetting of staff was ongoing and the Petitioner was scheduled to appear before the vetting panel on 20 March 2013 but the Petitioner was formally informed on 21 March 2013 that his vetting had been postponed (to 5 April 2013 .he had earlier been alerted through the phone of the postponement).

14. On 22 March 2013, the Petitioner responded to the letter of 15 March 2013 seeking several clarifications ahead of his vetting which had been rescheduled to 5 April 2013.

15. The Petitioner eventually responded to allegations which had been made against him as part of the vetting exercise on 25 March 2013. He was vetted on 5 April 2013.

16. The Commission informed the Petitioner on 10 April 2013 that after the vetting, he had been found suitable to continue serving in his then position.

17. Unexpectedly, things took a turn, for, on 29 April 2013, the Commission wrote to Petitioner informing him of the termination of his contract. The Commission informed the Inspector General of Police of the decision on 30 April 2013, including the redeployment of the Petitioner back to the Police Service (copied to the Petitioner).

18. The reason given for the decision to terminate the Petitioner's contract and redeploy him to the Police Service was that the Petitioner's long stay in the Commission would disadvantage his career development.

19. The Petitioner was aggrieved and he moved the Court on 19 June 2015 alleging constitutional violations and unlawful termination of employment.

20. The Commission, in rebuttal of the Petitioner's case, filed on 26 August 2015, a replying affidavit sworn by the then Secretary/Chief Executive Officer.

21. On 14 March 2017, the Petitioner was granted leave to file a further affidavit within 14 days. There is no sign of such an affidavit on record.

22. The Commission filed supplementary documents on 6 June 2018, and a witness statement and further list of documents on 20 December 2018.

23. The hearing of the Cause commenced on 26 February 2019 before Abuodha J. The Petitioner testified and closed his case on the same day.

24. Abuodha J was transferred from the station and this Court, pursuant to directives from the Principal Judge took the Commission's evidence on 5 March 2020. The Commission's Assistant Director, Human Resources testified.

25. The Petitioner filed his submissions on 3 April 2020 (electronically) while the Commission filed its submissions on 5 May 2020.

26. The Petitioner did not explicitly identify the Issues for determination while the Commission identified 5 questions, to wit:

(a) Whether the Petitioner was an employee of the Commission or a seconded public officer to the Commission.

(b) Whether the termination of contract and subsequent redeployment violated the Petitioner's fundamental rights under Article 41 (fair labour practice), 47 (fair administrative action) and 27 (freedom from discrimination).

(c) Whether the Petitioner's rights under Article 29 (freedom and security of person) was violated and whether he suffered psychological torture and harassment during his secondment period with the Commission.

(d) The powers of the Chief Executive Officer of the Commission.

(e) Whether the Petitioner is entitled to damages and costs of the Petition.

27. The Court has considered the pleadings, evidence and the submissions and will adopt the Issues as set out by the Commission in its submissions.

28. The Court will first address an Issue raised in the pleadings but not identified as an Issue by the parties.

### **Injuries in the workplace**

29. In the body of the Petition, the Petitioner pleaded that he had been injured in the course of work but the Commission had failed and/or declined to facilitate his compensation for the injuries.

30. Since there is an express statutory regime for adjudicating on work-based injuries, and the Petitioner did not explicitly seek any relief directly flowing therefrom, the Court will dismiss this head of the claim.

### **Secondment**

31. The Petitioner did not directly question the nature of his contractual relationship with the Commission, but it was a matter raised by the Commission, most probably because a finding on it would have a bearing on the fairness/lawfulness of separation.

32. To demonstrate that the Petitioner was on secondment, the Commission referred to various records/documents.

33. The first was the letter of offer to the Petitioner dated 23 June 2005 which acknowledged that he was already serving as a *public officer* (Kenya Police Service) and that there was no requirement for to resign from the *public office*.

34. The Commission also produced a copy of a letter dated 13 July 2005 to the Permanent Secretary, Directorate of Personnel Management requesting for approval for the secondment of the Petitioner (and 2 others) from the Kenya Police Service.

35. Another record drawn to the attention of the Court was a letter dated 22 July 2005 from the Commissioner of Police to the Commission seeking confirmation whether the Petitioner, who had earlier been seconded to the Anti-Corruption Police Unit (and others) were still in service on secondment.

36. The Commissioner of Police having reviewed its records confirmed in a letter dated 26 July 2005, that the Petitioner, among others, was on secondment and should be released to the Commission.

37. The last documents relied on by the Commission were a letter dated 19 July 2005 from Directorate of Personnel Management approving the secondment of the Petitioner to the Commission and the Commission's letter dated 24 August 2005 to the Commissioner of Police confirming the appointment of the Petitioner (and the 2 others) on secondment.

38. In terms of statutory authority, Section 18(2)(b) of the Ethics and Anti-Corruption Commission Act, allows the Commission to have *public officers* seconded by the Public Service Commission.

39. The Court has considered the records produced before it and further noted that the Petitioner did not suggest that the secondment was contrary to any law, and come to the conclusion that the Petitioner was at all material times on secondment to the Commission.

### **Powers of the Secretary/Chief Executive Officer**

40. The Petitioner challenged the authority of the Chief Executive Officer to make a decision to terminate his contract and redeploy him back to the Police Service in the absence of a properly constituted Commission and more so a Chairperson (there were only 2 Commissioners in office, the Chairperson was not yet in office).

41. According to the Petitioner, the Secretary had no authority to write the termination letter as such action flew in the face of section 9 Schedule 2 of the Ethics and Anti-Corruption Commission Act.

42. The proviso states

9. Unless otherwise provided by or under any law, all instruments made by and decisions of the Commission shall be signified under the hand of the Chairperson and the Secretary.

10 .....

43. Responding to the challenge, the Commission sought umbrage under section 16(7) of the Ethics and Anti-Corruption Commission Act which provides

16(7) The Secretary shall be—

(a) the chief executive officer of the Commission;

- (b) the accounting officer of the Commission; and
- (c) responsible for—
  - (i) carrying out of the decisions of the Commission;
  - (ii) day-to-day administration and management of the affairs of the Commission;
  - (iii) supervision of other employees of the Commission;
  - (iv) the performance of such other duties as may be assigned by the Commission.

44. According to the Commission, in terminating the Petitioner's contract and redeploying him back to the Kenya Police Service, the Secretary/Chief Executive Officer was exercising a supervisory responsibility/day to day administrative responsibility.

45. The decision, the Commission submitted was supported by the dicta of the Supreme Court in *Mable Muruli v Hon Wycliffe A. Oparanya & 3 Ors* (2016) eKLR that the functions of a Commission should not come to a standstill in the absence of Commissioners.

46. The Petitioner's offer of employment letter dated 23 June 2005 was personally signed by the Director/Chief Executive Officer (the operative law then was different).

47. The Offer letter of employment dated 11 September 2012, under whose tenure the Petitioner's contract was terminated was signed by the Permanent Secretary, Ministry Justice, National Cohesion and Constitutional Affairs (it was a transitory phase as contracts had expired without Commissioners in place to renew them).

48. The letter dated 29 April 2013 terminating the Petitioner's contract was signed by the Secretary/Chief Executive Officer.

49. The mandate to recruit staff of the Commission is reposed in the Commission under Article 252 of the Constitution. The mandate would by logic include the request to the Public Service Commission for secondment of *public officers*, and appointment of seconded staff as envisaged by section 18(2)(b) of the Ethics and Anti-Corruption Commission Act.

50. In the view of this Court, by parity of reasoning, the decision to terminate the contract of staff of the Commission, including seconded staff is the responsibility of the Commission and not the Chief Executive Officer acting unilaterally.

51. In the case at hand, there was no suggestion, even a remote one, that the 2 Commissioners then in place met (even without a quorum) to deliberate on the question of terminating the Petitioner's contract and/or to redeploy him to the Kenya Police Service.

52. The Secretary/Chief Executive Officer in purporting to terminate the Petitioner's contract was acting outside the legal scope of his authority. It was a unilateral and arbitrary act.

53. The decision must have been motivated by ulterior motives, for a vetting panel had only 2 or so weeks earlier found the Petitioner suitable to continue in service, a decision conveyed to the Petitioner by the same Secretary/Chief Executive Officer.

54. Having come to a conclusion on the basis of statutory law, the Court is of the view that it is not necessary for it to delve into the Constitutional issues which were raised such as the legality of the Commission when it did not meet the 2/3 gender rule in its composition.

55. The Court equally finds it academic to examine the jurisprudence arising from the question on the lawfulness or legality of the constitution of the Commission as discussed in *Eng. Michael Sistu Mwaura Kamau v EACC & Ors* (2016) eKLR; *African Centre for International Youth Exchange v EACC & Jane Muthaura* (2012) eKLR and Nairobi **Misc. Criminal Application No 288**, *Ruth Muganda v Kenya Anti-Corruption Commission & Ar* (2013) eKLR.

56. However, this Court takes note of the Court of Appeal judgment in *Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission & 4 others* (2017) eKLR wherein it found that a decision to prosecute when the Commission was not properly constituted was tainted.

#### **Unfair termination of employment/labour practices**

57. The Commission maintained that under the *termination clause* in the Petitioner's contract dated 3 July 2008, the contract could be terminated on *own volition, on recall by the Inspector General of Police or by discharge from the Police Service*.

58. The Commission in this respect urged that section 18(3) of the Ethics and Anti-Commission Act, did not alter the status of a seconded employee but was merely a safeguard measure to guarantee the employee benefits and obligations like other employees.

59. Further, the Commission contended that it complied with the requirement in section 35(1) as read with section 36 of the Employment Act, 2007 to give written notice or pay in lieu of notice.

60. And because the termination of the contract was not on account of misconduct, the Commission submitted, the hearing contemplated by

sections 41 and 44 of the Employment Act, 2007 did not apply.

61. Submitting on the lawfulness or validity of its decision, the Commission asserted that the long period the Petitioner had been on secondment was a hindrance to his career progression in the Police Service and thus there was a genuine decision to terminate the contract.

62. The decision, according to the Commission was at par with the holding in *Naim Bilal Yaseen v Judicial Service Commission* (2017) eKLR that the *release of a seconded employee did not amount to an unfair administrative action* and therefore did not amount to an unfair labour practice.

63. To the Court, the real question is whether seconded *public officers* are entitled to the protections assured employees under the Constitution and the general law of employment in this country, the Employment Act, 2007 before the termination of their secondment(s)/contracts.

64. The Court, however, will avoid reaching a decision on the basis of the Employment Act, 2007 as it does not apply to Police Officers, and the parties did not address its applicability where a Police Officer serves a *dual public office role/secondment*.

65. The starting point then, in the view of this Court is Article 236 of the Constitution which is in the following terms Protection of public officers

236 A public officer shall not be -

(a) ...

(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.

66. Even though on secondment, the Petitioner was holding or serving in a *public office* within the Commission. The termination of his contract and redeployment back to the Police Service was *removal* from a distinct office within the public service.

67. Apart from the removal, there were benefits and obligations which accrued to him on secondment as admitted by the Commission in its submissions.

68. This Court has no hesitation in finding that in the circumstances of this case, the Petitioner was entitled to due process. The failure to accord him the due process was an unfair labour practice.

### **Discrimination**

69. The Petitioner also alleged that he was discriminated against contrary to the right in Article 27(4) in that his contract was violated on the ground that he had served the Commission for long while those he had been appointed with at the same time were left to continue in service.

70. The Commission in resisting the discrimination claim asserted without challenge from the Petitioner that the staff the Petitioner was comparing himself with had resigned from the Kenya Police, and were thus not on secondment but had been directly employed.

71. The Court is unable to find, on the evidence on record that there was a violation of the Petitioner's right to equality and freedom from discrimination.

### **Right to freedom and security of the person**

72. The Petitioner, while giving evidence in chief stated that he was harassed by one of the Commission's Senior Officers whom he sued before the High Court. He said the harassment was through emails and that he sued for defamation.

73. According to the Petitioner, he suffered psychological torture as a result of the harassment.

74. With respect to the Petitioner, this Court is of the view that he is attempting to have a second bite having sued the said senior official. He ought to have placed his whole case on the emails, harassment and torture before the High Court.

75. The Court, therefore, declines to entertain this head of the claim.

### **Appropriate remedies**

76. The Petitioner sought 5 declarations

(a) A declaration that the Petitioner's freedom and security of the person was violated by the Respondent.

(b) A declaration that the Petitioner's right to equality and freedom from discrimination was violated.

(c) A declaration that the Petitioner's right to fair labour practices was violated.

(d) A declaration that the Petitioner's right to fair administrative action was violated.

(e) A declaration that the Chief Executive Officer of the Respondent violated the law by unilaterally and arbitrarily terminating the Petitioner's contract of employment

(f) An order expunging from records all emails/letters that are inaccurate and false.

(g) General damages for violation of the Petitioner's constitutional rights and freedoms.

(h) Costs of the Petition.

77. The Petitioner has succeeded on heads of claim which could have been litigated under statutory law and in the normal manner without invoking the Petition route.

78. In the circumstances, the Court is of the view that a only the declaration sought in (e) and an award of compensation would adequate and appropriate.

79. Considering the contract had only 5 more months to run, the Court would assess compensation equivalent to 5 months' gross salary (gross salary was Kshs 124,000/- per month).

### **Conclusion and Orders**

80. The Court finds and orders that

(a) A declaration do issue and is hereby issued that the Chief Executive Officer of the Respondent violated the law by unilaterally and arbitrarily terminating the Petitioner's contract of employment.

81. The Petitioner is awarded

(a) Compensation           **Kshs 620,000/-**

82. The Petition should not have invoked the Petition route and is therefore awarded costs on a half-scale.

**Delivered through Microsoft teams/video, dated and signed in Nairobi on this 29<sup>th</sup> day of May 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Petitioner Mr Magee instructed by Magee Wa Magee & Co. Advocates

For Respondent Ms. Kibogy, Attorney, Ethics and Anti-Corruption Commission

Court Assistants Kidemi/Judy Maina