



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 50 OF 2017**

**(Before Hon. Justice Hellen S. Wasilwa on 21<sup>st</sup> May, 2020)**

**WILLIS OCHAR.....PETITIONER**

**VERSUS**

**NATIONAL AIDS CONTROL COUNCIL....RESPONDENT**

**JUDGEMENT**

1. The Petitioner filed a Petition on 31/5/2017 alleging that the Petitioner violated his right of access to information under Article 35 (1) (3) (b) of the Constitution and his right to fair administrative action under Article 47 of the Constitution.
2. He avers that he was employed by the Respondent as an accountant in-charge of the Rift Valley Region. He avers that in February 2016, together with his supervisor they were suspended for ***“Overdrawing the South Rift Regional Account for Barclays Account”***. He avers that during the suspension, he was put on half salary.
3. He contends that in August 2016, he was invited to an oral hearing where he gave responses on question of accounts but regretted owing to the lapse of time and being locked from records, he could not remember all matters.
4. He contends that vide a letter dated 14/11/2016, his advocates requested for documents relating to the matter which include the following: proceedings and recommendations of the disciplinary committee, minutes of the Board that approved the sealing of the proceedings, Audited accounts by the independent auditor and any evidence that was used against him.
5. He avers that the Respondent did not supply him with any of these documents. He states that the Respondent in its letter dated 6/12/2016 indicated that the documents were either work in progress or confidential. He avers that the Respondent in its letters dated 30/11/2016 and 16/11/2016 demanded responses to various account activities some of which dated back to 2 years. He avers that in January 2017, he appeared on the set date by the Respondent and gave responses to the mater but nothing has ever been heard of the matter.
6. It is his case that the he has an interest to be tried upon information he fully understands and not to have information used against him minus a chance to make factual correction. Hence, the Respondent is in contravention of Article 35 (1) (3) (b) of the Constitution as the requested documents such as audited accounts were not availed to him.
7. He avers that the Respondent failed to give him a speedy and reasonable hearing and give effect to a fair trial under Article 50 of the Constitution. It is therefore his case that there was a violation of Article 47 (1) & (2) of the Constitution and the provisions of the Fair Administrative Action Act.
8. The Petitioner seeks the following prayers:
  - i. A declaration be issued that the failure by the **Respondent to provide information sought under Article 35 (1) (a) and also on the basis of the Petitioner’s request dated 14<sup>th</sup> November, 2016 is a violation of the right to access information and while the same was also intended for him to use for the purpose of his on defence, amounted to denial of right to fair hearing before the Respondents.**
  - ii. A declaration that to the extent that the Respondent has failed to resolve the matter for over one year and preferring to keep the Petitioner on half salary all the while, yet it is known to the Respondent that the same is hinged on his livelihood, is a violation of Article 47 (1) and (2) of the Constitution and the Fair Administrative Action Act.

iii. A declaration that to the extent that the Respondent has failed to resolve the matter for over one year and preferring to keep the Petitioner on half salary all the while, yet it is known to the Respondent that the same is hinged on his livelihood, is a violation of Article 41 (1) & (2) (a) and (b) of the Constitution.

iv. A declaration that the entire trial process based on need for the Petitioner to provide succinct information on cheque book numbers without any reference materials being afforded him more than 8 months is unreasonable and defeats the principle of Wednesbury and as such is a miss-trial. In sum process is arbitrary, unreasonable, irrational and unconstitutional.

v. An order compelling the Respondent to provide the Petitioner with all the withheld salaries and all other allowances since the date of his suspension.

vi. An order compelling the Respondent lift the suspension and re-deploy the Petitioner to duties and work normally.

vii. Costs and interests thereof of this Petition.

viii. Such further, other and consequential orders as this Honourable Court may deem fit to make.

9. As opposed to a supporting affidavit, the Petitioner filed a Verifying Affidavit sworn on 31/5/2017.

#### **Respondent's case**

10. The Respondent filed a Replying Affidavit sworn by Gregory Weere its Head Human Resources and Administration, on 10/7/2017. He avers that the Petitioner's suspension was done following the overdrawing of the Respondent's South Rift Regional Account and failure to bank balances.

11. He avers that the Petitioner admitted to not banking funds at the end of planned activities. He avers that a disciplinary Committee meeting was held on 1/8/2016 and a decision made. He avers that there was some delay as the decision of the Committee had to be presented before the Finance and Administration Committee of the Board for approval.

12. He avers that before the decision of the Committee could be communicated to the Petitioner, he stated that he had additional evidence to submit to the Committee. He further avers that it was discovered that there were several allegations raised by the Internal Audit Report and the handover report which the Petitioner signed but had not been formally communicated to him and had not responded to formally.

13. He avers that the allegations were communicated to the Petitioner through the letter dated 30/11/2016 and a Disciplinary Committee meeting held on 20/1/2017. He contends that the Respondent did not breach the Petitioner's right to information for reasons that documents could not be supplied to him for reasons that the Disciplinary Committee and the Board had not made the final decision and the audited accounts by the Independent Auditor were not part of the proceedings. In addition, the Petitioner did not request for other documents during the disciplinary hearings.

14. He contends that the Petitioner's request for additional time to respond to allegations against him were always obliged to. He contends that the decision to terminate the Petitioner was based on his own admissions and a letter to this effect was done on 24/5/2017.

15. He avers that the Petition was filed on 31/5/2017 after a decision was finally made and the Petitioner informed to collect his dismissal letter. He avers that the Respondent's case is that it reads malice aforethought by the Petitioner as he filed the case 6 months after his demand letter dated 14/11/2016 and just when a decision to dismiss him had been made.

16. The Petitioner filed a Supplementary Affidavit on 25/7/2017. He avers that Gregory Weere does admit that the period between 23/2/2016 to 1/8/2016 when disciplinary proceedings commenced is a long time.

17. He avers that the Respondent has failed to produce any documentary evidence of the proceedings leading to its decision.

#### **Petitioner's submissions**

18. The Petitioner submits that the Respondent was at all time buying time and waiting to terminate him as it failed to engage his advocates and expected him to respond to the accounting queries. He relies on Article 35 (1) of the Constitution and submits that the Respondent has from the onset not set a fair play as they declined to supply him with the necessary documents. He submits that in the Affidavit sworn by Gregory Were the Respondent changes its narrative and avers that the information sought did not include the scope of the questions sought.

19. He avers that while the Respondent maintains that it conducted disciplinary proceedings, they have failed to produce any evidence of these proceedings. He submits that the Court ought to make an adverse inference by finding that there was no disciplinary sitting.

20. He submits that the principles set out in Tanga Town Council case as cited in **R v National Police Service Commission Ex-parte Daniel Chacha Chacha [2016] eKLR** were not observed by the Respondent.

21. He submits that the Respondent avers that it cannot be forced to employ the Petitioner as it dismissed him. It is his submission that if fair procedure was not followed then the Respondent has to contend with him since a public body is bound by Article 20 of the Constitution. He urges the Court to find that he was owed due process and order his immediate return to work.

## **Respondent's submissions**

22. The Respondent submits that the Petitioner in his email sent on 6/1/2016 acknowledged that he withdrew money for his personal use and was unable to refund the amount. It submits that this action led to it accruing losses.
23. It submits that the suspension was in line with existing Regulations Circular OP. CAB 3/77A dated 24/5/2010 on handling cases of public officers suspected to be involved in corrupt practices, Chapter 5.2 Section (g) of the Respondent's Human Resource Administration Policies Regulations May 2008 and Respondent's Board resolutions of 18/2/2016. It submits that this position was communicated to the Petitioner vide the letter dated 23/2/2016.
24. It avers that the Petitioner has not drawn any attention to the Court of any express contractual or legal position that he is entitled to a hearing before suspension. It submits that the Petitioner has not demonstrated that section 41 of the Employment Act and Article 236 of the Constitution were violated before he was suspended. It is therefore its submission that the Petitioner was rightfully suspended.
25. It relies on the Labour Court of South Africa decision in **National union of Mineworkers and Ano v Commission for Conciliation Mediation and Arbitration JR 2512 of 2007** where the Court held that employment relationship can only exist in an atmosphere of trust and is subject to an employee's good faith.
26. It submits that it lost money due to the Petitioner's actions and it was proper to take disciplinary action against him and dismiss him. It is its submission that it complied with Section 43 (1) of the Employment Act and that there were valid reasons for termination and the Petitioner was aware of these reasons.
27. It submits that the Petitioner is not entitled to any of the orders sought for reason that the termination was fair. It submits that the Petitioner is not entitled to reinstatement as the Court in **Kenneth Karisa Kasemo v Kenya Bureau of Standards [2013] eKLR** held that reinstatement is directed in exceptional circumstances and employment does not envisage an employee being forced upon an employer. In conclusion it submits that the Petitioner has not proved his claim thus it should be dismissed with costs.
28. I have examined all the averments of the Parties and submissions filed herein. The issues for this Court's determination are as follows:-
- 1. Whether the Petitioner's rights have been breached by the Respondent.**
  - 2. Whether the Petitioner is entitled to the remedies sought.**
29. On the 1<sup>st</sup> issue, the Petitioner approached this Court on 2/6/2017 and secured orders restraining the Respondents from further acting on the suspension letter that had suspended the Petitioner in February 2016.
30. In response to this application the Respondent admitted that the Petitioner had been suspended on 23/2/2016 for overdrawing the South Rift Regional Account and failure to bank balances at the end of the activities are required.
31. The Respondent averred that the Petitioner admitted to this wrong doing.
32. A disciplinary Committee was thereafter held on 1.8.2016 and a decision made.
33. Before the decision of the Committee could be communicated to the Petitioner, the Petitioner apparently informed the Head of Human Resource that he had additional evidence to submit to the Committee and it was further discovered that there were several other allegations raised by the Internal Audit Report and the handover report which the Petitioner signed but had not been formally communicated to and so the Petitioner had not been given a chance to respond.
34. The Respondents aver that these allegations were communicated to the Petitioner through a letter dated 30<sup>th</sup> November 2016 and a disciplinary committee meeting held on 30<sup>th</sup> January 2017 as per the Respondent's annex GW3.
35. The meeting did not go on as scheduled and was postponed to 30<sup>th</sup> January 2017 at 11 am. It is not clear whether this disciplinary hearing ever went on as there are no Minutes submitted to this Court indicating the same.
36. The Respondents have annexed their Appendix GW5- a summary dismissal letter dated 24.5.2017 indicating that the Petitioner was actually dismissed on the said date following disciplinary meetings held on 1.8.2016 and 22.1.2017.
37. The Petitioner admitted that he had erroneously presented the account's cheque book instead of his own. He also admitted that he had not banked some moneys to the Respondent's account.
38. He avers that he was invited to a disciplinary hearing but was given a dismissal letter in an action to defeat the purpose.
39. Despite the fact that the Petitioner was aware that he had been dismissed, he came to Court without disclosing this fact and obtained orders barring the Respondent from acting on the suspension letter.
40. The Petitioner also now aver that he was denied some information by the Respondent in contravention of Article 35(1) of the Constitution.

41. The Petitioner did not demonstrate what information he sought from the Respondents and for which the Respondent did not supply.
42. The Petitioner also averred that the disciplinary process he was subjected to was flawed because there was no disciplinary sitting at all and this is because the Respondents have not annexed any evidence that the said proceedings ever took place.
43. On this, I agree with the Petitioner that there is no proof that he was subjected to any disciplinary processes as there is no proof that such a sitting ever took place. In the circumstances, I find that the Petitioner's right to a fair hearing was flouted.
44. Other than lack of proof of a hearing, the Petitioner had admitted in writing that he failed to bank the money to the Respondent's account as expected and this was in breach of his duties.
45. In the circumstances, I find that though the Petitioner was dismissed for apparently valid reasons, he was not accorded a fair hearing and he was placed on suspension for an inordinately long period without any proper hearing. This breached his right to fair labour practices.
46. In terms of remedies, I find the Petitioner is entitled to the withheld half salary before dismissal in May 2017.
47. I also award the Petitioner damages equivalent to 500,000/= for breach of his right to fair labour practice.
48. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

**Dated and delivered in Chambers via zoom this 21<sup>st</sup> day of May, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Juma for Petitioner – Present

Respondent – Absent