



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 199 OF 2019

JOEL NDUNG'U BEDAN.....PETITIONER

-VERSUS-

THE PRINCIPAL SECRETARY MINISTRY OF

INTERIOR & COORDINATION OF NATIONAL GOVERNMENT.....1ST RESPONDENT

THE HON. THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

1. The Petitioner brought this petition on 28.10.2019 alleging that his employment was unfairly terminated by the respondent and his constitutional rights violated. He therefore prayed for the following reliefs:-

- i) A declaration does issue that the decision of the 1st Respondent of 11th April 2019 dismissing the Petitioner amounted to unfair and wrongful termination.
- ii) An order does issue quashing the decision dismissing the Respondent and as such ordering his reinstatement back to service with all the benefits so far withheld and a corresponding pay for all the times that he missed his salaries and allowances.
- iii) An award of damages to the petitioner for all the loses he has suffered, mental anguish and opportunities he has missed as a result of his unlawful dismissal.
- iv) Costs of the petition.
- v) Interests on items (iii) and (iv) above
- vi) Such further and consequential orders as this Honourable Court may deem fit to make.

2. The Respondent opposed the petition by filing grounds of opposition on 15.11.2019. Thereafter the parties agreed to dispose of the petition by written submissions.

Petitioner's case

3. The Petitioner was employed by the Ministry of Interior and Coordination of National Government on 2.10. 1992 as a Clerical Officer in the Department of Immigration . On 18.12.2017 he was transferred from Jomo Kenyatta International Airport to the Head Office at Nyayo House. On 9.3.2018, he received a letter of interdiction alleging that he had caused the loss of 20 sticker VISA books valued at Kshs. 5 million. The letter also invited him to show cause why disciplinary action should not be taken against him.

4. The petitioner responded by his letter dated 12.4.2018 denying any role in handling visa stickers and clarified his job description as involving the following six duties namely:

- (a) Issuing of receipt books to immigration officers.
- (b) Collecting cash from immigration officers
- (c) Banking cash

- (d) Issuing of stationeries
- (e) Doing monthly accounts returns
- (f) Posting cash receipts.

5. He stated that on the date when the sticker visa books were allegedly lost, he left work before the books were delivered. He denied that he caused the loss of the sticker visa books, and also the offence that he acted dishonestly by giving false information.

6. He stated further that on 27.4.2018 he was addressed a dismissal letter which also informed him of the right to appeal. He contended that he lodged his appeal within the prescribed time but for 5 months he received no communication about the appeal forcing him to file this suit. He contended that the termination was unjust and it grossly affected his livelihood. He further stated that his rights and freedoms were violated including:

- (a) Right to protection from dismissal from office without due process of the law under Article 262 (sic) of the Constitution.
- (b) Right to information under Article 35(2) of the Constitution.
- (c) Right to Fair Administrative Action under Article 47 of the Constitution including right to speedy determination of his appeal.
- (d) Contravention Article 41 (1),10,27 and 232 (1) (a) (b),(c) & (e) of the Constitution.

7. He further stated that he was dismissed unlawfully without a valid reason and in breach section 41 or 42 of the Employment Act.

Respondent's case

8. The Respondent's case is that the petition is premature and offending the principle of ripeness; it is frivolous and misconceived; and that the disciplinary action taken against the petitioner is not illegal, ultra vires or in breach of constitutional principles as alleged by the petitioner.

Petitioner's submissions

9. The Petitioner submitted that the petition is not premature and reiterated his averment that he was forced to sue after the lapse of 5 months without receiving any communication about his appeal. He contended that section 4 of the Fair Administrative Actions Act (FAA Act) enjoined all administrative bodies to act fairly and expeditiously. He relied on **James Gacheru Kariuki & 22 Others v. Kiambu County Assembly and 3 others [2017]** to urge that any bottlenecks must be discouraged when it comes to enforcement fundamental rights such as in the current petition.

10. As regards the procedure followed before the termination, the petitioner submitted that it was an unfair procedure because he was denied oral hearing to explain himself on the alleged false information which arose from misconstruction of his reply to the show cause letter. He submitted that section 4(4) of the FAA Act entitled him to attend the disciplinary proceeding in person or in the company of an expert of his choice; to be heard; and to cross-examine any person who gave adverse evidence against him.

11. He relied on **Judicial Service Commission of Kenya v. Mbalu Mutava & Another [2015]eKLR** to fortify the foregoing submissions.

12. The Petitioner further relied on the copy of movement records to prove that the Visa Stickers were received by Nathan Mugure in shift D and not from him. He urged that it was erroneous for the respondent to rely on the said documents to fire him. He therefore, prayed for the reliefs sought herein.

Respondent's submissions

13. The Respondents submitted that the petition herein is premature because the internal disciplinary process has not yet been exhausted. They contended that after the dismissal the petitioner filed an appeal with the Public Service Commission and the same is still pending under section 74 (1) of the Public Service Commission Act, 2017. They relied on **Cortex Mining Kenya Limited v. Cabinet Secretary of Mining & 9 Others [2015] eKLR** and **National Environment Management Authority Exparte Sound Equipment Ltd (Misc. Civ. Appl. 7 of 2009)** to urge that if there is alternative remedy, the court should not review administrative action unless the petitioner demonstrates exceptional circumstances..

14. They further relied on section 9(2) of the FAA Act which prohibits the court from reviewing administrative actions or decision until the internal mechanism of appeal or review has been exhausted.

15. The Respondents further submitted that there was a reasonable cause for them to institute disciplinary proceedings against the petitioner. They contended that on 13.3.2018, the Authorised Officer approved the recommendations of the Ministerial HR Management Advisory Committee (MHRMAC) to dismiss the petitioner with effect from 9.3.2018.

16. They contended that under section 5(1) and (2) of the Public Service (Values and Principles) Act, every officer is enjoined to maintain high standards of professional ethics including honesty, high standard of integrity, transparency and accountability. They further urged that a public officer must use public resources in an efficient, effective and economic manner and he is seen to have failed to fulfil that requirement

if there is unreasonable loss. They contended that on 12.8.2017 the petitioner was issued with sticker booklets serial numbers 6296001 – 6297000 out of which 20 sticker booklets could not be accounted for. They contended that the lost booklets were valued at Kshs. 5 million and they posed a threat to the National Security if they fell on wrong hand.

17. The Respondents further submitted that the termination of the claimant's services was fairly done in compliance with Article 47(1) and (2) of the Constitution since the petitioner was accorded a hearing before the termination. They contended that by the show cause letter dated 9.3.2018, the petitioner was given 21 days to respond to the allegations against him and he did so vide his letter dated 12.4.2018.

18. Thereafter the matter was considered by the MHRMAC and made recommendation that the petitioner be dismissed. The recommendation was approved by the Authorised Officer on 13.3.2019 and a dismissal letter was addressed to the petitioner. They further contended that the petitioner appealed by the letter dated 27.5.2019 to the Public Service Commission and the appeal is still pending. They maintained that the dismissal was done in compliance with the Constitution, the Employment Act and other relevant laws.

19. They relief on **Walter Ogal Amro v. Teachers Service Commission[2013]eKLR** where the court held that for termination of employment to pass the fairness test, there must be both substantive and procedural fairness. They contended that they have demonstrated herein that the dismissal of the petitioner was for a valid reason and that a fair procedure was followed as prescribed under section 41 and 45 of the Employment Act. They therefore submitted that the petitioner is not entitled to the reliefs sought and prayed for the same to be dismissed with costs.

Petitioner's Rejoinder

20. In a brief rejoinder the petitioner reiterated that the hearing of his appeal delayed for over 5 months forcing him to sue. He relied on **Grace Omolo v. Attorney general & 3 Others[2012]eklr** where Majanja J opined that a delay of disciplinary hearing for one year is an inordinate delay and it infringes on the petitioner's rights under section 47 of the constitution. The court further opined that the interdicted officer had a legitimate expectation that under Regulation G33(13) of the Code of Regulations for the Civil Service, her case would be completed within six months or within reasonable time.

21. The Petitioner reiterated that the delay in determination of his appeal was in exceptional circumstance justifying this suit because he had been dismissed and had lost all his livelihood. On the other hand the petitioner urged that the narration by the respondents in their submissions are without any basis because the respondents never filed any Replying Affidavit to adduce evidence. He further urged that an adverse finding be made that either the respondent have no evidence to support their case or they have withheld evidence from the court because it favours him.

22. Finally, the petitioner reiterated that the respondent did not tender any evidence to justify his dismissal and also to prove that a fair procedure was followed.

Issues for determination

23. There is no dispute that the claimant was employed as a public officer as pleaded in his petition until 13.3.2019 when he was dismissed from service. It is now trite that under Article 236 of the Constitution, a public officer is protected from dismissal or removal from office except through the due process of the law. Again, section 45 of the Employment Act bars an employer from dismissing his employee except for a valid and fair reason and after following a fair procedure. The issues for determination are as follows:-

- (a) Whether the petition is premature.
- (b) Whether the dismissal of the petition was justified by a valid and fair reason.
- (c) Whether a fair procedure was followed.
- (d) Whether the petitioner is entitled to the reliefs sought.

Is The Petition Premature

24. The respondents objected to the petition on ground that it was prematurely brought before exhausting the internal disciplinary mechanism. They contended that the petitioner lodged appeal against the dismissal before the PSC and the same is still pending.

25. Section 9(2) of the FAA Act provides that:-

“The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this act unless the mechanisms including internal mechanism for appeal or review and all remedies available under any other written law are exhausted.”

26. In **Cortec Mining Kenya Limited v. Cabinet Secretary of Mining & 9 Others {2015} eKLR**, the court held that:-

“Where an alternative remedy exists, the applicant seeking an order of judicial review, must disclose the existence of the alternative remedy and should demonstrate the exceptional circumstances, if any, under which judicial review is sought instead of the remedy provided by statute.

27. In this case the petitioner contended that he appealed to the PSC after the dismissal but for over 5 months he heard no word from the PSC. He therefore felt compelled to seek the court's intervention. I agree with him that failure to have any communication from PSC for over 5 months from the date of filing his appeal justified his decision to access the court of law for justice.

28. Article 47 of the Constitution requires that administrative action must be done expeditiously. That provision extends to the hearing and determination of appeals to the PSC. The respondents cannot insist that the petitioner exhausts internal mechanisms in which they have put a bottleneck. Consequently, I return that the claimant has demonstrated a good cause to warrant accessing this court before his appeal at the PSC is fully determined.

Substantive Justification

29. The Respondents have acknowledged in their submissions that the employer must have a valid and fair reason before dismissing his employee from employment. Under section 45(2) of the Employment Act a valid and fair reason for dismissing an employee from service is one which relates to his conduct, capacity and compatibility or based on the employer's operational requirement. Section 43 of the Act further provides that in any legal proceedings challenging termination of employment, the employer has the burden of proving the reasons while section 47 (5) of the Act further obligates the employer to justify the reason.

30. The reason cited for the dismissal in the letter dated 11.4.2019 was gross misconduct. The letter did not give any particulars of the misconduct and it did not refer to any correspondence where the reason is particularised. It is therefore not clear to this court which offence led to the dismissal of the petitioner.

31. The foregoing notwithstanding, the petitioner pleaded that he was dismissed for the allegations made vide the show cause letter dated 9.3.2018 which led to his interdiction. The respondents admitted the foregoing in their written submission. The offences included causing the loss of 20 visa sticker booklets valued as Kshs. 5 million and dishonesty through giving false information. The petitioner denied committing any of the said offences and averred that it was not his duty to handle or supervise handling of visa stickers booklets. He further contended that the said booklets were delivered after he left work on the material day. He further denied that he gave false information to the employer and averred that his response to the show cause letter does not state that he did not report to work on the material date.

32. The above evidence by the petitioner was not controverted by the respondents who did not also file any Replying affidavit to oppose the petition. I therefore, find and hold that the respondents dismissed the petitioner from service for no valid and fair reason and his constitutional right to fair administrative action under Article 47 of the Constitution was violated. I further agree with the petitioner that the narrations made on behalf of the respondents in their counsel's written submission were unsupported by pleading and evidence and as such they are merely submissions from the bar.

Procedure Followed

33. The petitioner contended that he was not afforded fair procedure before the dismissal because he was not accorded an oral hearing. The respondent responded that she gave the claimant an opportunity of being heard through a show cause letter dated 9.3.2018 and he responded by the letter dated 12.4.2018. Section 41 of the Employment Act requires that before dismissing an employee for misconduct, the employer shall explain the reasons to the employee in the presence of another employee of his choice and thereafter accord the employee and his companion a chance to air their defence which must be considered before the dismissal is determined.

34. Applying the provision of section 41 of the Act to the facts of this case I find that fair procedure was not followed before dismissing the petitioner from service. Article 236 of the Constitution protects public officers from dismissal without following the due process of law. In this case the claimant was served with show cause letter to answer the charge of lost visa sticker booklets but he was dismissed for the said offence and also the offence of giving false information through his response to the show cause letter. He was not afforded any chance to answer to the charge of making false information. The dismissal letter did not also notify him that he was dismissed for giving false information and losing the sticker booklets.

35. On the other hand, the claimant appealed against the dismissal but 5 months after lodging the appeal no communication was received forcing him to file this petition. I agree with the petitioner that the delay in receiving any word about his appeal was a good reason to worry, especially noting that he had been under interdiction for one over year before the dismissal. Considering all the observations made herein above, which have not been rebutted by evidence, I return that the procedure followed in the disciplinary process was not in accordance with the procedure laid down by section 41 of the Employment Act, section 4 of the FAA Act and Article 236 of the Constitution and as such the petitioner's right to Fair Administrative Action under Article 47 of the Constitution was violated.

Reliefs

36. In view of the observation and findings, herein above, that the dismissal of the petitioner was devoid of substantive and procedural fairness, I make declaration that the decision by the 1st Respondent on 17.4.2019 to dismiss the petitioner amounted to unfair and wrongful termination.

37. I further order the respondent to reinstate the petitioner to his employment with full benefits including the missed salary and allowances due to the said unfair disciplinary action. In granting the reinstatement I have considered the fact that the petitioner has registered his desire for the reinstatement. I have also considered the fact that it is practical to reinstate the petitioner in the Interior Ministry because it has a country wide operation. Finally, I have considered the fact that three years have not lapsed after the dismissal of the petitioner.

38. The claim for general damages is dismissed because it is not well grounded.

39. Finally, I enter judgment in favour of the petitioner in terms of the orders granted above. Considering the fact that the parties will

continue in an employment relationship, I will not award costs.

Dated, signed and delivered in Nairobi on this 26th day of June, 2020.

ONESMUS N. MAKAU

JUDGE