



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 135 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

**IN THE MATTER OF: ARTICLES 2(1), 3, 10, 19, 20, 21, 22, 23, 25, 27, 28, 41, 47, 50,
159, 162(2), 165(5)(b), 232, 236 AND 258 OF THE CONSTITUTION OF KENYA, 2010;**

AND

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS
UNDER ARTICLES 10, 27, 28, 32, 33, 35, 41, 47, 48, 50, 232 AND 236 OF THE CONSTITUTION OF KENYA, 2010;**

AND

IN THE MATTER OF: THE ENFORCEMENT OF THE CONSTITUTION OF KENYA, 2010;

AND

IN THE MATTER OF: SECTION 5 OF THE EMPLOYMENT ACT 2007;

AND

**IN THE MATTER OF: SECTIONS 5, 6, 7, 8, 9 AND 10 OF PUBLIC
SERVICE (VALUES AND PRINCIPLES) ACT NO. 1A OF 2015;**

AND

**IN THE MATTER OF: SECTIONS 4, 6, 7, 8, 9 AND 11 OF THE
FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

AND

**IN THE MATTER OF: RULES 18, 19 AND 24 OF THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)**

PRACTICE AND PROCEDURE RULES, 2013;

BETWEEN

JOSEPHINE WASHIFUTSWA NAMBIRO.....PETITIONER

VERSUS

JUDGMENT

The Petitioner, Josephine Washifutswa Nambiro filed this Petition on 22nd July 2019 against the Respondent, Energy Regulatory and Petroleum Authority. The Petition is brought under *Articles 10, 20, 21, 22(2), 27, 41, 47, 50, 159, 236 & 259 of the Constitution of Kenya*. She also filed a Notice of Motion dated 19th July 2019. The Court directed that both the Petition and Application be dispensed with together.

The Petitioner avers that on or about 3rd July 2019, she was invited by the Respondent's Principal Human Resource Officer, Miss. Eunice Ayodo via email to attend a meeting at the Respondent's head office in Nairobi to be held on 5th July 2019. That on the said 5th July 2019 while at the Respondent's boardroom and after waiting for 2 hours, the Senior Office Administrator at the Director General's Office served her with a letter dated 4th July 2019. That the letter was to the effect interdicting her for the unauthorized release/transfer of the Respondent's confidential information and official documents from her official email to her personal email, and to third parties' accounts without approval from the Director General. She avers she was not aware of any preliminary investigations being conducted on her and that she is yet to receive any report or brief on the same to date, contrary to the principles of natural justice and the Respondent's Human Resource Policy and Procedures Manual.

That the said interdiction letter does not meet the form set under the Respondent's Human Resource Policy and Procedures Manual and the Discipline Manual as it does not disclose who undertook the purported preliminary investigation, under whose instructions, the dates when it was undertaken, the alleged third parties to whom emails were sent and the documents purported to be confidential. Further, that the Committee that is alleged to have sat during the 22nd Special meeting on 3rd July 2019 and made a resolution for her to be interdicted with immediate effect does not have the jurisdiction at that stage of interdiction as under **Section 11.12.1 of the Human Resource Policy and Procedures Manual**. She contends that the Committee of the Board can only be ceased of the matter when the HRAC recommends to it the particular disciplinary action to be taken against an employee.

She avers that the Respondent's action is unlawful and meant to pre-empt the court's decision and defeat the cause of justice on the following grounds:

- a) The Petitioner filed a *Constitutional Petition No. 101 of 2018* pursuant to the Respondent having transferred the Petitioner to Kisumu on demotion from her position as Principal Office Administrator grade 6 to Administrative Assistant Grade 7.
- b) The Petitioner was granted conservatory orders staying the implementation of the letter of redesignation and redeployment on 26th June 2019 until the Petition is heard and determined. The order was served upon the Respondent on 26th June 2019 which order the Respondent has not complied with.
- c) The Respondent has interdicted employees who have referred matters to any government agency or filed a matter before the court against it. The employees who have fallen victims of this malicious scheme of victimization besides the Petitioner are **John Sigura Otido Cause No. 294 of 2018** and **Eustace Muriithi Njeru Petition No. 127 of 2018** and **Complaint to Ombudsman**.

She contends that the Respondent has denied her the right of a fair hearing on the purported preliminary investigation report as guaranteed under **Section 41 of the Employment Act, 2007, Section 4 part 1 of the Fair Administrative Actions Act, the Mwongozo Code of Governance for State Corporations and the Respondent's Human Resource Policy and Procedure Manual 2019**. That her interdiction and the procedure thereto was traumatizing, undignified, irresponsible, shocking, careless, sudden, smacks of arrogance and impunity and has occasioned irreparable injury and damage to her livelihood. The Petitioner avers that the Respondent has infringed on her constitutional and fundamental rights and freedoms under the following provisions of the Constitution: -

Article 10(1) which provides that national values and principles of governance binds all State organs, including the Respondent, while applying the Constitution or implementing public policy decisions.

Article 20 which states that the Bill of Rights binds all State organs including the Respondent to allow every person to enjoy the rights and fundamental freedoms in the Bill of Rights, which the Petitioner was not accorded as an employee.

Article 27 which provides for the right against discrimination which the Respondent has infringed by interdicting the Petitioner after singling her out and conducting some illegal investigations against her and denying her equal treatment and benefit of the law.

Article 41 which provides for the right to fair labour practices which the Respondent infringed as it interdicted the Petitioner without any justifiable reason and by way of victimization.

Article 47 which provides for the right to fair administrative action which the Respondent infringed by failing to accord the Petitioner a fair hearing before taking any adverse decisions against her and further interdicting her knowing well that it was bereft of such power under any written law.

The Petitioner submits that she was instructed by the Respondent to hand over all property in her possession which is only done when an employee is leaving employment of an employer and that this contravened her right under **Article 48 of the Constitution**.

The right to fair hearing before an independent and impartial tribunal or body under **Article 50** as provided for under the Respondent's Human Resource Policy and Procedure Manual was deliberately and arbitrarily breached by the Respondent, to achieve the common end or goal of terminating the Petitioner.

The Petitioner's right to go to court for redress upon violation of her constitutional rights under **Articles 22, 23, 48 and 258 of the Constitution** has been infringed by the Respondent. This is demonstrated by the Respondent amending its Human Resource Practice and Procedure Manual to include a *clause under 6.13* requiring the Respondent's Director General to immediately suspend any of the Respondent's staff who has taken the Respondent to Court. Further, that the said amendment was done without prior consultation of the Respondent's employees and key stakeholders.

The Petitioner prays for the following Orders and Declarations that: -

- a) *The court do issue an order that articles 10, 27, 28, 41, 47, 50, 73 and 236 of the constitution have been violated by the Respondent thus the Respondent's action of interdicting the Petitioner is null and void.*
- b) *A declaration that the action of the Respondent is opaque, egregious, clandestine, capricious whimsical and contrary to articles 10, 27, 28, 41, 47, 50, 73 and 236 of the constitution of Kenya, 2010 hence unconstitutional and consequently null and void.*
- c) *This Court do issue a Declaration that section 6.13 of the Energy and Petroleum Regulatory Authority's Human Resource Practice and Procedures Manual (2019) be declared unconstitutional as it is inconsistent with articles 22, 48 and 258 of the Constitution and therefore null and void.*
- d) *This Court be pleased to grant an order of Permanent Injunction prohibiting/restraining the Respondent, its servants, officials, representatives, and/or agents from taking any disciplinary action against the Applicant or having so taken be restrained from acting thereupon or otherwise in any other manner.*
- e) *An order to set aside the letter dated 4th July, 2019.*
- f) *General damages for the constitutional violations of the petitioners' fundamental rights.*
- g) *The Court do issue any other Orders and give such directions as it may deem fit to meet the ends of justice.*
- h) *Costs of the Petition.*
- i) *Interest on the above at court rate.*

In the Notice of Motion dated 19th July 2019, the Petitioner/Applicant seeks the following Orders that:

1. *Spent.*
2. *Pending the hearing and determination of this Application interparte, the Court be pleased to issue and hereby issues an order suspending the implementation of the interdiction letter dated 4th July, 2019 written by Mr. Robert Pavel Oimeke, the Director General of the Respondent.*
3. *Pending the hearing and determination of this Application interparte, this Court be pleased to grant conservatory orders reinstating the Applicant to her office and position.*
4. *Spent.*
5. *The costs of this application be provided for.*

UPON INTER PARTES HEARING

6. *Pending the hearing and determination of this Petition, the Court be pleased to issue and hereby issues an order suspending the implementation of the interdiction letter dated 4th July, 2019 written by Mr. Robert Pavel Oimeke, the Director General of the Respondent.*
7. *Pending the hearing and determination of this Petition, this Court be pleased to grant conservatory orders reinstating the Applicant to her position.*
8. *Spent.*
9. *The costs of this application be provided for.*

Respondent's Case

The Respondent filed its Grounds of Opposition dated 9th August 2019 opposing both the Petition and Application on the grounds that the Petitioner had proceeded on the misapprehension that the issuance of the interdiction is a sanction and/or disciplinary action, thereby failing to appreciate that it is an investigative and fact finding venture preceding commencement of a disciplinary process. That the Application herein is incompetent as it lacks sufficient evidence and/or probative material to buttress the claim seeking permanent injunction against the

interdiction letter. Further, that the Application and Petition are premature as the Petitioner has not exhausted the internal dispute resolution mechanisms and there is no final determination that has been made for this Court to interrogate and render itself upon.

The Respondent filed two Replying Affidavits dated 9th August 2019 sworn by its Principal Human Resource Officer, Eunice Ayodo and the Information and Cybersecurity Officer in its ICT department, Mikhail Gorbachev. The affidavits were sworn in response to both the Petition and Application.

Eunice denies that the Respondent has commenced any disciplinary action and/or proceedings against the Petitioner contending that the Petitioner is misleading this Court so as to obtain undeserving orders. She avers that the interdiction is the foundation of an investigative process pursuant to the provisions of the Respondent's Human Resources Policies and Procedures Manual, the Employment Act, the Rule of Law and terms and conditions of the employment contract which the Petitioner agreed and submitted to. That consequently, the process of interdiction is not in itself conclusive but preventive and it is further a contractual undertaking and/or obligation between parties that is contained in an employment contract. She contends that this Court cannot therefore be called upon to interfere in an internal administrative and fact finding process.

Without prejudice to the foregoing, she avers that it was discovered that the Petitioner was the unauthorized bearer and dispatcher of highly sensitive and classified material that is only meant for internal organizational consumption by specific personnel and/or staff. That the Petitioner dispatched the same without the required approval contrary to the Respondent's Human Resource and ICT policies. She lists the said confidential items as hereunder:

- i). *Corporate Risk Register*
- ii). *Rental Invoices to a regional office*
- iii). *Minutes of Staff Meetings*
- iv). *Machinated correspondences disguised as official internal memos*
- v). *Leaking enforcement intelligence correspondence*
- vi). *Shared internal regulation reports to personal emails*

That the Petitioner's actions led to the Respondent conducting comprehensive investigations to establish the veracity thereof and the Respondent proceeded to issue her with an interdiction letter pursuant to **Section 11.12 of the Manual**. That the Respondent was justified to interdict the Petitioner because if she were to remain at her station there is a possibility she would interfere with investigations by either tampering and/or deleting evidence from her source emails and/or computer; impressing upon the recipients to delete and/or erase the subject correspondences; and continue with her fact-gathering endeavors. That after the interdiction, an investigation team was to interrogate the preliminary discoveries and then table its report and the Petitioner would have been allowed to respond and/or offer her representations thereto. That it was incumbent for the Finance and Administration Committee (FAC) to be engaged in the deliberation of the staff matter it forms an integral arm of the Board, pursuant to its mandate. Further, the deliberation touched on a broad spectrum of employees, both senior and junior and therefore the issues could not be separated.

She continues to aver that interdiction being the rational and permissible mode to proceed, which information was conveyed by the Respondent's Director General within his mandate as the Chief Executive Officer. That there is distinct separation and independence of suits i.e. *Petition 101 of 2018* arises from transfer whilst the present suit is predicated upon interdiction and cannot be construed together. In the alternative, she avers that the Petitioner has not adduced any material of probative value indicating resistance or frustration by the Respondent or any evidence, legislation or statutory framework providing that an employee has a right to be accorded a hearing prior to being interdicted. That the Respondent is bound to suffer severe prejudice and grievous injustice if the orders sought by the Petitioner are granted for the following reasons:

- a) This Court shall curtail its right under **Article 41(4)(a) of the Constitution of Kenya** by barring it from conducting its function of investigations arising from a procedurally sanctioned interdiction contrary to the rule of law and principles of justice
- b) This Court shall have substituted itself as the employer by placing itself in the shoes of the Respondent and determining the merits of the interdiction instead of limiting itself to the interrogating the entire disciplinary procedure/process as required at law
- c) This Court shall be denying the Respondent its right to equal protection and benefit of the law by reason that the orders shall have the consequent of unfairly stifling and/or limiting the rights of the employer to conduct its administration pursuant to its policies and guidelines whilst overly protecting the Petitioner beyond where her rights should end and the Respondent's begin.
- d) This Court shall not have considered the rights of both parties herein by reason that, in order to strike a balance of convenience, it ought to appreciate that with regard to the nature of sensitive and confidential information retained by the Respondent, a State organization, the subject matter transcends the parties herein and to public interest which surpasses individual interest, therefore, the balance of convenience tilts towards the Petitioner proceeding to interdiction within terms provided at law.

She denies that the Respondent has violated the Constitutional provisions alleged in the Petition and contends that the Petition herein is premature and is meant to stop a lawful and procedural internal process of the Respondent. Further, that the Petition was filed within two weeks of issue of the interdiction letter; before conclusive investigations had been carried out, commencement of the disciplinary hearing and determination arising therefrom. That the allegations of bias and malice ought to be specifically proven and not merely alleged as the

standard to be applied is that of a reasonable man. That under the principle of finality, a party ought to first exhaust the laid down procedure prior to moving the Court for redress and that there is therefore no decision for the court to quash or declare unconstitutional. That the Petitioner has failed to set out with a reasonable degree of precision that which she complains of, the provisions said to be infringed and the manner in which they are alleged to be infringed.

Mikhail Gorbachev on the other hand avers that the Respondent, through its ICT Policy, is committed to the protection of information systems against any imminent threats by adopting procedures and practices that enhance and ensure privacy of information. That the said ICT policy and guidelines apply to all employees, interns and board of directors and that the ICT department routinely monitors the entire chain of data/information transmission from the source user, mail server, mail gateway, and firewall then to the destination. That pursuant to **Section 3.3.2 of the ICT Policy**, the information discovered in the possession of the Petitioner is deemed as confidential and which information is not approved for general distribution outside the Respondent and only available to authorized personnel within it. That it is noteworthy that the Respondent, being a State Corporation, retains information that also transcends to that which is relevant and sensitive to the nation and citizenry pursuant to its functions and mandates.

He avers that he is aware that from the Risk Champion Appointment Memorandum, the Petitioner is not amongst those selected and ought therefore not to be in possession of the Corporate Risk Register at all. He further avers that the Respondent's ICT staff were well within their mandate and responsibility in the discovery of the Petitioner's unauthorized activities and that the Petitioner was also aware of such policy and guidelines on the Respondent's ICT having been trained on the same.

Petitioner Submissions

The Petitioner submits that **Article 27 of the Constitution, Section 5 of the Employment Act** prohibits discrimination and that **Article 50(1)** provides that bias and prejudice have no room in the administration of justice. That the test for bias was set out by the Court of Appeal in **Phillip K. Tunoi & Another v Judicial Service Commission & Another [2016] eKLR**. That the question is whether a fair minded observer, who has considered the facts, would conclude there was a real possibility that the tribunal was biased.

She submits that the Respondent's failure to inform her that she was under investigations is against **Section 11.4.1(a) of the Respondent's Human Resource Policy and Procedures Manual 2018** which provides that in handling disciplinary matters, the EPRA shall be guided by the rules of natural justice. On her interdiction being unprocedural after the DG wrote her interdiction letter, the Petitioner relies on the case of **Republic v Kenya School of Law & 2 Others ex-parte Juliet Wanjiru Njoroge [2014] eKLR** where the court stated:

"In the Uganda case of Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300, it was held:

"...It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

On the remedies available to her following the Respondent's constitutional violations, the Petitioner relies on the case **Miriam Wambui Thiriku v Bomas of Kenya [2017] eKLR** where the Court awarded the claimant Kshs.500,000 for unfair labour practice in violation of Article 41 of the Constitution. She further cites the case of **Esther W. Kiege v Kenya Forest Service and Another [2018] eKLR** where the court awarded the petitioners Kshs.2 Million each for violation of their constitutional rights to fair labour practices by the respondent. The Petitioner in the present Petition submits that she deserves to be paid constitutional damages of Kshs.5 Million in view of the court's previous decisions such as in **Mundia Njeru Gateria v Embu County Government and 5 others [2015] eKLR**.

Respondent's Submissions

The Respondent submits that the court in the case of **Kenya Plantation & Agricultural Workers Union v Finlays Horticulture Ltd [2015] eKLR** quoted the decision in the case of **Mckenzie v Smith (1976) IRLR 345** that suspension/interdiction of an employee within an employment relationship under common law must have a contractual basis.

That in the case of **John Siguro Otido -v- Energy Regulatory Commission & another [2018] eKLR**, Radido J. upon being faced with the issue of validity of an interdiction letter found in favour of the Respondent that the letter was regular and procedural and found no merit in the claimant's applications seeking to halt and lift the interdiction. Further, in **Joseph Makau Munyao & 4others -v- Kenya Ports Authority & another [2016] eKLR**, the court declined to declare that the interdictions were illegal and expressed as follows:

"The interdiction of the Claimants had contractual basis, and the Claimants were informed that the interdictions were to facilitate investigations. The interdictions were part of a process which could either find the allegations baseless or as founding grounds for disciplinary penalties. The relief is declined."

On the Petition being premature, the respondent submits that the Court in the case of **Audrey Wafubwa & 5 Others v Speaker Trans Nzoia County Assembly & 3 Others [2017] eKLR** found that the claimants had failed to prove that their rights had been infringed upon as they had not even been asked to show cause or defend themselves as the respondent had only just commenced investigations.

Determination

I have considered the pleadings, submissions made both orally and in writing and the authorities cited by both parties. The issues arising for determination are the following: -

1. Whether the interdiction complied with the respondent's Human Resource Policy and Procedures Manual.
2. Whether the Petitioner is entitled to the prayers sought.

Petitioner's impugned letter of interdiction dated 4th July 2019 and which was issued to her on 5th July 2019 after being summoned from her workstation by email to attend a meeting at the respondent's boardroom is reproduced below –

EPRA/FF/007

4th July 2019

Josephine Nambiro

Energy and Petroleum Regulatory Authority

P. O. Box 42681 – 00100

NAIROBI

RE: INTERDICTION

The above subject matter refers.

A review of the end users' activities within the Energy and Petroleum Regulatory Authority's ICT systems and equipment established that there has been unauthorized release/transfer of the Authority's confidential information and official documents from your official email account to your personal email account and to third parties' accounts without approval from the Director General.

The Energy and Petroleum Regulatory Authority (EPRA), formerly Energy Regulatory Commission (ERC), Human Resources Policy and Procedures Manual, 2018 provisions for safeguarding information within the Authority state that;

1. Section 10.19.1

An employee shall not directly or indirectly use or allow any person under his authority to use any information obtained through or in connection with the office, which is not available in the public domain, for the furthering of any private interest, whether financial or otherwise.

2. Section 10.30.1

An Employee shall ensure that confidential or secret information or documents entrusted to his care are adequately protected from improper or inadvertent disclosure.

3. Section 10.30.2

An Employee shall;

- a) *Comply with Official Secrets Act, Cap. 187;*
- b) *Adhere to EPRA's procedures and directives for safeguarding Information and documents;*
- c) *Not disclose any information to any unauthorized person or in contravention of such procedures and directives.*

4. Section 10.38.1

While in the course of their duties, employees will be exposed to confidential information. In such cases, they will be expected to uphold strict standards in regard to confidentiality of information.

5. Section 10.38.2

Disciplinary action will be taken against any employee proven to have divulged confidential information without the permission of EPRA.

6. *In addition, you assented to Code of Conduct, 2018 confidentiality clause in your contract dated 14th December 2009 which states that:*

“You are required to consider confidential all information regarding the Commission that comes to your knowledge by virtue of your employment. Such information shall not be conveyed to a third party without express permission from the Director General. Am/ breach of confidentiality will be regarded as gross misconduct and may result in summary dismissal”.

7. Preliminary internal investigations have revealed that you have breached all the above stated clauses. Consequently, as provided for in Clause 7.7.2.7 of the Human Resources Policy and Procedures Manual (HRP&PM 2018) the FAC at its 22nd Special meeting held on 3rd July, 2019 resolved that you be interdicted with immediate effect to pave way for further investigations.

8. During the period of interdiction, you shall:

a. Be paid half (½) of your basic salary and full house allowance and medical benefits pursuant to Clause 11.12.2 (HRP&PM, 2018).

b. Report to the Ag. Director Enforcement, Consumer Awareness & Protection once a month, by 5th of every calendar month starting August 2019, until the investigations are complete. Refer to clause 11.12.3 (HRP&PM, 2018).

You are therefore required to hand over all Authority's property in your possession to your supervisor as you proceed on interdiction.

Yours Sincerely

SIGNED

Robert Pavel Oimeke

Director General”

The respondent’s Human Resource Policy and Procedures Manual (the HR Manual) provides for employee discipline at Section 11. Section 11.4 provides for the guiding principles as follows –

“11.4 Guiding Principles

11.4.1 EPRA shall be guided by the following principles in handling disciplinary matters:

a) The rules of natural justice:

b) Procedural fairness, where an officer must be allowed adequate opportunity to prepare and present his/her case;

c) The determining authority must be unbiased when hearing and making decisions;

d) Decisions must be based upon logical proof or evidential material.

e) Fair administrative action, which is expeditious, efficient, lawful, reasonable and procedurally fair.

f) Every officer to whom disciplinary action is taken has a right to:

i. Written reasons for any disciplinary action that is taken against him;

ii. Prior and adequate notice of the nature and reasons for the intended disciplinary action;

g) An opportunity to be heard and to make representations in that regard;

h) An opportunity to attend proceedings in person or in the company of an expert of his choice, cross examine persons who give adverse evidence against him and request for adjournment of proceedings where necessary;

i) Notice of the right to legal representation, where applicable;

j) Notice of a right to an appeal or review against a disciplinary decision;

k) Information, materials and evidence to be relied upon in making a decision or taking a disciplinary action.”

Section 11.9.9 of the HR Manual provides for the procedure for dealing with major offences or gross misconduct as follows –

“11.9.9 In event of major offence or gross misconduct, the misconduct might be serious enough to justify dismissal without any

warning. In such a case, the HRAC may direct that the culprit be required to show cause why a severe disciplinary action should not be meted against him.

11.9.9.1 The Head of HR&A shall issue the officer with a show cause letter stating the particulars of the alleged misconduct and invite him/her to respond in writing to the allegations and the grounds, if any, on which he/ she relies to exonerate himself/herself;

11.9.9.2 Where an employee deserts duty or his whereabouts are unknown, the show cause letter will be addressed to the employee's last known contact address by registered mail and he will be given at least seven days to respond.

11.9.9.3 An officer shall be given reasonable opportunity to respond to the charges against him/her and requested to respond within seven days (7) days;

11.9.9.4 On expiry of the period specified above, whether or not the officer has responded, the case shall be presented to the EPRA's HRAC to deliberate, conduct disciplinary hearing and make recommendations.

11.9.9.5 If in the opinion of HRAC there is need for investigation prior to the hearing, the DG will constitute a committee to investigate the matter.

11.9.9.6 While constituting a team the DG shall observe the following conditions: -

a) Constitute a team of not less than three (3) officers to investigate the matter (where the team is more than three members, the team shall consist of an odd number).

b) The officers conducting the investigation shall be senior to the accused officer and should not have dealt with the case before.

11.9.9.7 The disciplinary hearing shall be conducted expeditiously, efficiently, lawfully, reasonably and in a procedurally fair manner in accordance with Article 47 of the constitution and the Fair Administrative Action Act No 4 of 2015.

11.9.9.8 The HRAC after hearing the matter shall prepare a report consisting of the following:

a) Background information leading to the relevant incident;

b) Input from the witness or witnesses;

c) The employee's response to the allegation(s);

d) An analysis of the facts;

e) A statement that all the entitlement of employee facing the disciplinary action have been observed and

f) Recommendations.

Of relevance to this petition, the HR Manual provides that the employee be issued with a notice to show cause. Section 11 provides that the show cause letter is the first step in the disciplinary process and that it is only after an employee fails to exonerate himself or herself that the matter would escalate to investigations. It is the HRAC to determine that an employee be investigated further and at this point that a decision is made whether or not to interdict the employee.

Interdiction as provided for under Section 11.12 is necessary only where investigations are to be carried out and there is need for the employee to stop carrying out his duties during the investigations. This is only necessary where the employee is likely to interfere with the investigations or in circumstances where the employee's presence would embarrass or prejudice such investigations.

Section 11.12.11 specifically provides that –

“an employee may be interdicted to allow investigations to be conducted in a case where proceedings may lead to dismissal.”

In the instant case, the letter of interdiction does not require the employee to respond to the charges against her. It is further evident from the letter of interdiction that the petitioner had no clue that she was under investigation. The letter further does not state the time frame within which the Petitioner was required to be on interdiction and therefore leaves it open for the employees to be an indefinite interdiction.

Interdiction is punishment to an employee as in the first place, the employee is placed on half of his basic pay. This invariably causes financial strain to an employee. The employee is further removed from exercising the duties of his office hence is subjected to both psychological and financial embarrassment. Interdiction should therefore not be resorted to unless it is necessary as it exerts punishment on an employee who has not been proved to be guilty of misconduct. That is why it should only be resorted to after giving the employee an opportunity to respond to the charges against him through a notice to show cause, or where investigations have been carried out and the employee has already been engaged and has responded to the charges during investigations.

The respondent's manual provides that the disciplinary process should comply with Article 47 of the Constitution, the Fair Administrative

Act and Public Service Regulations. Article 236 of the Constitution prohibits the dismissal, removal from office, demotion in rank or otherwise subjecting a public officer to disciplinary action without due process.

From the foregoing, I find that the interdiction of the Petitioner was in violation of both the Respondent's HR Manual and Articles 47 and 236 of the Constitution. It was therefore unconstitutional.

Remedies

Having made the findings above, I make the following orders –

1. I declare the interdiction of the petitioner by letter dated 4th July 2019, unconstitutional and therefore null and void.
2. I order that any salary withheld during the Petitioner's interdiction be released to the Petitioner.
3. For the avoidance of doubt, the nullification of the letter of interdiction is not a bar to disciplinary action being taken against the Petitioner provided the same is in compliance with the law and the respondent's Human Resource Procedures and Policies Manual.
4. In view of the relationship between the Petitioner and the respondent, which is still subsisting, the court declines to award damages for the breach of the Petitioner's rights in addition to declaring the letter of interdiction null and void.
5. The Respondent shall bear the Petitioner's costs of this petition.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JULY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE