



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

PETITION NO. 8 OF 2020

IN THE MATTER OF: ARTICLES 1, 2, 3(1), 10, 19, 20, 21, 22, 27(1), (2) & (3),

47(1) & (2), 48, 50(1)(2)(a) AND (o) AND 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: RULE 4, 10, 11, 13 AND 20 OF THE CONSTITUTION OF

KENYA (SUPERVISORY AND PROTECTION OF FUNDAMENTAL RIGHTS AND

**FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES
201**

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER

ARTICLES 27(1), (2) AND (3), 28, 41(1), 47(1) AND 50(1), (2)(a) & (o) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: SECTION 62(3) OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, 2003

AND

IN THE MATTER OF: SECTION 4 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

BETWEEN

JAMES MAKURA M'ABIRA.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

RULING

1. The Claimant herein was offered employment by the Solicitor General on 15th December 2003 as a State Counsel II in the Public Prosecutions Department. He accepted the offer and worked for the Attorney General's Office the predecessor of the Respondent. The Petitioner asserts that the Solicitor General issued him a letter on 23rd June 2011 which required him to cease exercising the duties of his office immediately as at that time until the criminal case facing the Petitioner was heard and determined. The Petitioner sued the Respondent for the alleged failure by the Respondent to lift the interdiction aforesaid. He asserts that his right to fair administrative action and fair labour practices. It was argued that the Petitioner was being dismissed from service contrary to the law and the Constitution. In particular, it was argued that the Petitioner's salary was stopped contrary to Section 62(3) of the Anti-Corruption and Economic Crimes Act, 2003 which entitled him to automatic reinstatement after acquittal. The Petitioner asserts that various Articles of the Constitution have been infringed such as the right to fair trial, right to fair labour practices and right to fair hearing thus entitling him to relief. The Petitioner therefore sought

a declaration that the act of the Respondent in serving him with a notice to show cause initiating dismissal proceedings and stopping his salary based on the concluded Anti-Corruption case is in breach of the Petitioner's constitutional rights under Articles 27(1), (2) and (3), 28, 41, 47 and 50 of the Constitution and that the same was null and void for all intents and purposes; an order directing the Respondent to reinstate the Petitioner to employment without loss of benefit and if already dismissed, an order of reinstatement; an order of judicial review in nature of *certiorari* to bring to this court the letter dated 22nd May 2019 and 22nd April 2020 quashing the same and reinstating the Petitioner to employment if already dismissed; and, an order of judicial review in the nature of prohibition, prohibiting the Respondent from proceeding or initiating any further disciplinary action based on the same facts.

2. The Respondent was opposed to the Petition and filed grounds of opposition and a replying affidavit sworn by Mrs. Dorcas Oduor, Secretary Public Prosecutions in the Office of the Director Public Prosecutions. In the grounds, it was asserted that on 18th March 2020 the Petitioner was recommended for dismissal by the Advisory Board established under Section 17(1) of the Office of the Director of Public Prosecutions Act on account of gross misconduct. The Respondent argued that the Petitioner had been issued with a show cause notice on 22nd May 2019 seeking him to show cause why disciplinary action may not be taken against him in accordance with Section 11.15 of the ODPP Human Resource Manual and responded to it on 3rd June 2019. It was asserted that the Petitioner's response to the show cause was placed before the Advisory Board and that the Petitioner was accorded a fair hearing before the decision to dismiss him from service was reached. It was argued that the decision reached did not offend the provisions of Article 50(2)(o) of the Constitution of Kenya. The Respondent argued that in its show cause letter it clearly enumerated what actions by the Petitioner constituted gross misconduct as per Section 44(1) of the Employment Act. The Respondent argues that the process the Petitioner underwent was provided for under the ODPP Human Resources Manual and the Public Service Commission Human Resource Policies and Procedures Manual for the Public Service 2016. The Respondent stated that the judgment the Petitioner relied on was clear on the culpability of the Petitioner in receipt of the bribe. The Respondent argued that the Petitioner had not demonstrated that in dismissing him from service the Respondent had acted without or in excess of the powers conferred upon it by law or have infringed, violated, controverted or in any other manner failed to comply with or respect and observe the provisions of the Constitution of Kenya 2010. The Respondent asserts that the Petitioner has merely stated his rights and has failed to demonstrate with particularity how his rights have been infringed and violated and the nature and extent of the violation. The Respondent asserts that Articles 50(1), 47(1) of the Constitution of the Republic of Kenya cited by the Petitioner are not applicable to the internal process undertaken by the Respondent against the Petitioner. The Respondent argued that the Petitioner had cited Article 41 of the Constitution and had not made any reference to any specific action of the Respondent that constitute unfair labour practices nor demonstrate any element of unlawfulness or discrimination.

3. The Respondent also gave notice of a preliminary objection that the Petition does not raise any constitutional issues requiring the determination of this court and that the Petition should thus be dismissed in its entirety. In summary, the Respondent asserts in its submission to the preliminary objection that the Petitioner's assertions of alleged violation or infringement of his rights were not supported by precise recitation of the alleged violations as held in a variety of cases on the constitutional threshold of infringement of rights. The Respondent argued further that there was no double jeopardy as the Petitioner was now facing internal disciplinary process and not another criminal trial. The Respondent argued that not all breaches amount to constitutional petition and the relationship between the Petitioner and the Respondent should be viewed as such in consideration of the internal mechanism of the Respondent.

4. The matter was canvassed via the online platform currently in place for articulation of cases and in attendance was Mr. Wahome Gikonyo for the Petitioner and Mr. Duncan Ondimu for the Respondent. The Court thanks both of them for the concise and erudite arguments. The issue that must first be dealt with is the matter of the preliminary objection against the Petition on the constitutional threshold that must be met in such a petition. It was argued that general breaches or tortious conduct as well as matters contractual do not elevate a dispute to the constitutional platform. It was further submitted by the Respondent that the alleged violations of the Constitution were not particularised. The Respondent argued the dispute before the Court was not one that met the threshold of a constitutional infringement. In support of the first line of attack, the Respondent cited the case of **Francis James Ndegwa v Tetu Dairy Co-operative Society Ltd [2016] eKLR** Justice Ngaah citing with approval the decision of Lord Diplock in **Harrikson versus Attorney General of Trinidad & Tobago [1080] AC 265** stated thus:-

Having appealed against the decree as provided for under section 81(1) of the Co-operative Societies Act, and more so having had his application for stay of execution of that decree rejected, is it open to the petitioner to challenge the execution of the same decree on the basis that his fundamental rights and freedom are being infringed or are threatened with infringement? I reckon not, firstly, because where a particular procedure has expressly been stated, that procedure must followed and in the instant case, it appears to have been followed only that its success is in doubt. In Methodist Church in Kenya Trustees & Another versus Rev. Jeremiah Muku & Another (2012) eKLR, the Court of Appeal, after citing several decisions on this issue, came to the conclusion that ordinary errors made in the course of adjudication by the courts should be cured by invoking the mechanism and procedures prescribed by the ordinary law for correction of errors such as appeal or review. Secondly, the invocation of the provisions of the Constitution to allege breach of constitutional rights in addition or as an alternative to laid down procedure of seeking a particular remedy is in my view frivolous, vexatious and an abuse of this Court's process. Lord Diplock made reference to this sort of proceedings in his pronouncement in Harrikson versus Attorney General of Trinidad & Tobago (1980) AC 265 where he said:-

The notion that whenever there is failure by an organ of government or public authority or public officer to comply with the law this entails contravention of some human right or fundamental freedom guaranteed to individuals by the chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6 (1), the mere allegation that a human right fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom.

Here there is no evidence that an organ of government or public authority has failed to comply with the law as to make out a case for the petitioner that his human right or fundamental freedom has been contravened. His is what the learned judge must have had

in mind when he talked of “the mere allegation that a human right or fundamental freedom has been or is likely to be contravened”. And being only a mere allegation, the petitioner is not entitled to invoke the jurisdiction of this Court under article 22 of the Constitution.

5. The Respondent additionally argued that the alleged infringements must be particularized. The Respondent cited the cases of **Justice Amraphael Mboghali Msagha v The Chief Justice of the Republic of Kenya & 7 Others [2006] eKLR**, where the Court (Lessit, Wendoh and Anyara Emukule JJ) held that

A person alleging a breach or contravention of Chapter V rights carries a heavy burden of proof to be discharged by that person or an Applicant. This has been the theme in most cases, including-

(1) CYPRIAN KUBAI -VS- STANLEY KANYONGA MWENDA (Nairobi High Court Misc. Application No. 612 of 2002 (unreported) Khamoni J. struck out an application and said-

“An Applicant moving the court by virtue of Sections 60, 65 and 84 of the Constitution must be precise and to the point not only in relation to the Section, but also to the subsection and where applicable, the paragraph or sub-paragraph of the Section set out of 70-83, allegedly contravened plus the relevant act of that contravention so that the Respondent knows the nature and extent of the case to enable the respondent prepare accordingly and also know the exact and nature of the case it is handling...”

(2). In ANARITA KARIMI NJERU –VS- REPUBLIC (No. 1) [1979] K.L.R. 154, Trevelyan and Hancox JJ held-

“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

3. In DR. KORWA ADAR & OTHERS –VS- ATTORNEY-GENERAL the court cited the earlier case of MATIBA –VS- ATTORNEY-GENERAL High Court Misc. Application No. 666 of 1990-

“An Applicant in an application under Section 84 (1) of the Constitution is obliged to state his complaint the provision of the Constitution he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of this court under the Section. It is not enough to allege infringement without particularizing the details and the manner of infringement.”

It was argued by the Respondent that the Petitioner did not particularize the specific infringements as required in order to elevate the dispute to the constitutional threshold. The Respondent submitted that the disciplinary process is quite different from the criminal process and cited the case of **Republic v Secretary, Teachers Service Commission & Another ex Parte Samuel Mulamula Lipeya [2016] eKLR** where it was held that

*The Applicant prayed for the remedies of certiorari, mandamus and prohibition. As was stated by the Court of Appeal in **Civil Appeal No. 266 of 1996, Kenya National Examinations Council v Republic Ex Parte Geoffrey Gathenji Njoroge & Others**, the orders sought only lie against a public body when exercising public authority. In that case the court stated as follows-*

*... an order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. If the complaint is that the duty has been wrongly performed, i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done. Only an order of **CERTIORARI** can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons...*

The Applicant has not proved any of the grounds upon which he sought the orders prayed for in his application for judicial review.

6. The Petitioner on his part cited Section 62(3) of the Anti-Corruption and Economic Crimes Act and asserted that the termination being contemplated by the Respondent is in contravention of the Constitution and the law. It was asserted that the interdiction meted out on 23rd June 2011 was to subsist until the hearing and determination of the Criminal trial which trial resulted in an acquittal. It was argued that no disciplinary action was taken from 2011 and that after the acquittal under Section 215 of the Criminal Procedure Code by Hon. M. N. Gicheru (as she then was), the Petitioner was entitled to be reinstated. The Petitioner asserts that there was no hearing granted to him contrary to Article 47(1) before the service of the salary stoppage notice. He asserts that the actions of the Respondent are contrary to the fair labour practices guaranteed by Article 41 of the Constitution and fair administrative action under Article 47 as well as a right to hearing under Article 50. The Petitioner thus asserts the Petition is merited and the letters issued by the Respondent in respect of the notice to show cause as well as the purported dismissal be quashed.

7. The Petitioner no doubt is aggrieved by the decision made by the Respondent to issue him a show cause letter as well as the abrupt stoppage of salary. He has articulated in his Petition that his constitutional rights have been infringed by the Respondent. To this the Respondent asserts there is no breach capable of remedy under the Petition as the Respondent has not abridged any of the provisions and additionally that the Petitioner has not met the threshold for raising constitutional issues. In the case of **Anarita Karimi Njeru v Republic (supra)** E. TREVELYAN and A.R.W HANCOX JJ held as follows:-

We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to

the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

The Petitioner did not particularize and articulate in the Petition the particular right said to have been infringed or given the specific Article impinged in respect of each and every allegation of constitutional breach. As the dispute between the parties is one that is solely in the prism of an employment dispute, no constitutional questions arise to elevate the dispute to the rarefied sphere of constitutional petition. In the final analysis I find that the preliminary objection succeeds and the Petition is hereby struck out with no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 13th day of July 2020

Nzioki wa Makau

JUDGE