



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 127 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 15th October, 2020)

ABDULAHI MOHAMMED OMARPETITIONER

VERSUS

ENERGY REGULATORY COMMISSION...RESPONDENT

JUDGEMENT

1. The Petitioner, Abdullahi Mohammed Omar filed a Petition dated 28th November 2018 under **Articles 22, 258 and 165 (2) of the Constitution of Kenya** against the Respondent, Energy Regulatory Commission. He prays for the following Orders and Declarations:-

a. A declaration that the decision to summarily dismiss the Petitioner as contained in the letter dated 8th November 2018 by the Respondent is opaque, egregious, clandestine, capricious, whimsical arbitrary, unfair, unlawful and contrary to Articles 10,21,27,28, 32, 33, 35, 41,47, 50 and 236 of the Constitution of Kenya and Sections 44, 45 and 46 of the Employment Act, 2007 hence unconstitutional and consequently null and void;

b. A declaration that the termination of the Petitioner's contract was in violation of his legitimate expectation and contrary to Articles 10,27,28,32,33,35,41,47 and 50 of the Constitution of Kenya;

c. A declaration that the Respondent's actions against the Petitioner amounted to unfair labour practice and are in breach of the Petitioner's constitutional right in terms of Article 41 of the Constitution of Kenya;

d. An Order of Certiorari quashing the decision of the Respondent dismissing the Petitioner as the Senior Surveillance and Enforcement Officer as contained in the Respondent's letter dated 8th November 2018 for being in contravention of Articles 27, 28, 32, 33, 35,41, 47, 50 and 236 of the Constitution 2010 as well as Sections 44, 45 and 46 of the Employment Act, 2007;

e. A declaration that under Article 236 of the Constitution, the Petitioner remains the lawful holder of the position of the Senior Surveillance and Enforcement Officer and to continue to hold the office effective immediately with full rights and benefits and without any loss;

f. An order for reinstatement of the Petitioner to his former employment and position without any loss of benefit and/or seniority and continuity of service;

f. The Respondents to permit the Petitioner to resume his official duties with effect from the date of the Court's judgment;

h. General damages for the constitutional violations of the Petitioner's fundamental rights;

i. The Honourable Court do issue any other Orders and give such directions as it may deem fit to meet the ends of justice;

j. Costs of the Petition;

k. Interest on the above at Court's rate.

2. The Petitioner avers that he was employed by the Respondent on 1st March 2011 as an Accounts Assistant on a three (3) months' contract and was later offered a permanent and pensionable position as a Cashier from 03/09/2012 after applying and being interviewed for the said position. That he has further served the Respondent in various capacities until he was dismissed on 08/11/2018.
3. That prior to the dismissal, on or about 20/05/2018, he formally complained to the Respondent's Director General against acts of harassment, bullying, and discrimination meted on him by Mr. Cyprian Nyakundi, his then immediate supervisor.
4. That the Respondent re-designated him as a Senior Surveillance and Enforcement Officer and transferred him to its Eldoret Regional Office without his consent and prior consultation and that on 11/09/2018, Mr. Cyprian openly threatened him with summary dismissal and arrests.
5. He avers that the committee that commenced a disciplinary hearing against him on 13/09/2018 did not adhere to the procedure under the Respondent's Human Resource Manual as it invited only one party to the dispute and also failed to inform him that a disciplinary hearing against him was underway.
6. He avers that the Respondent has infringed on **Article 3 of the Constitution** by failing in its obligations under the Constitution. That the Respondent violated **Articles 10 (2) (b)** and **Article 27** by failing to treat him equally or with the same level of respect and dignity as it did with its other employees. That he was constantly intimidated by his supervisor, discriminated against and side-lined in career development opportunities/ trainings and that his self-worth generally diminished. That the Respondent also ignored the complaints he made but considered all complaints made against him.
7. The Petitioner avers that the Respondent subjected him to indignity before the law in breach of his rights under **Articles 28** and the Respondent's Human Resource Policy and Procedure Manual. That this was after the Respondent ignored his request not to be transferred to a position that will not help his professional advancement and which transfer would equally separate him from his family. That in the alternative and without prejudice to the foregoing, the Respondent exercised administrative action or decision in abuse of power and/or in misfeasance in public office which has led to the Petitioner losing his income.
8. He avers that the Respondent has infringed on his right to freedom of conscience, religion, thought, belief and opinion under **Article 32** and on his right to freedom of expression under **Article 33** by constantly frustrating his employment growth and summarily dismissing him when he sought clarification on what he believed to be discrimination, favoritism and bigotry.
9. That the Respondent also infringed on his right to access information under **Article 35** when it denied him the CCTV footage and the investigation reports, which information would have helped him prepare his defence for the disciplinary hearing.
10. He further avers that the Respondent violated his right to fair labour practices under **Article 41** by failing to provide him with a favourable working environment; transferring him to surveillance and enforcement which is a discipline he has no academic background or professional experience of; and terminating his contract in an unreasonable and unfair manner.
11. That the Respondent also breached his right to fair administrative action under **Article 47** as read together with the Fair Administrative Action Act, No, 4 of 2015 by failing to accord him an opportunity to be heard by an independent Disciplinary Committee and make representation in that regard.
12. That he was thus condemned unheard in disregard of his right to natural justice and his right to fair hearing under **Article 50**. That the Respondent violated **Article 236** by continuously subjecting him to victimization, discrimination and disciplinary action without due process of law required for a public officer.
13. The Petitioner avers that he is therefore entitled to the prayers sought in the Petition and that because of the Respondent's conduct as outlined herein, the matter is an appropriate case for an award of constitutional damages.

Respondent's Case

14. The Respondent filed a Response to the Petition dated 18th January 2019 stating that the alleged grievances herein are purely of an employment nature and that fronting the same as a Petition renders the claim fatally defective. That the Petitioner has also failed to demonstrate any violation of the constitutional provisions he has quoted in his petition.
15. Further, that the Petition was filed prematurely and is an abuse of the Court process as **Clause 11.2.1 of the Respondent's Human Resource Policy and Procedures Manual, 2018** provides that any grievance arising from the decision of the Respondent is to be handled in line with the Public Service Commission Act.
16. The Respondent avers that the Petitioner served it in various capacities during his employment period and that it appointed him by a letter dated 28/08/2012 which he duly executed. That it transferred and redeployed personnel including the Petitioner to various regions within the country as mandated of it by its Human Resource Policy & Procedures Manual.
17. That the same was further in line with the constitutional requirement to devolve services which it approved at the meeting held on 25/07/2018 and that it also considered its Career Guidelines. That the Petitioner's new job of Senior Surveillance and Enforcement Officer meant he was promoted to Job Grade ERC 5 which demonstrates that he has been able to move up the job grade pursuant to various promotions before his summary dismissal. It contends that it considered all the Petitioner's concerns subsequent to his redeployment and it denies in total any allegations of discrimination against it.

18. It avers that the Petitioner was interdicted to allow for further investigations into the complaint and that in the letter dated 02/10/2018, it required the Petitioner to show cause as relates to the gross misconduct and insubordination. That the said show cause letter further detailed the particulars of the charges against the Petitioner which amounted to contravention of the provisions of the Employment Act and its Human Resource Policy & Procedures Manual.

19. That when the Petitioner responded to the show cause, he was advised of the date of disciplinary hearing and his request for information was justifiably declined as explained in the letter of 15/10/2018. That the Petitioner was then orally heard by the Human Resource and Advisory Committee on 19/10/2018 which found him guilty of all the charges after considering his response and evidence from other witnesses.

20. That it then summarily dismissed the Petitioner as under the HR Policy & Procedures Manual and communicated the same to him by the letter dated 08/11/2018. That it also notified the Ministry of Labour and Social Protection with a copy sent to the Kenya National Employment Authority.

21. It further avers that the Petitioner has previously been subjected to disciplinary action for gross insubordination such as in November 2014 when he was cited for having declined to undertake tasks assigned to him by his supervisor. That the Petitioner is also currently facing criminal charges in *criminal case 1715 of 2018* for threatening and using abusive language which amounted to creating disturbance. That the Petitioner's allegations are baseless and that the Petition should be dismissed and or struck out.

22. The Respondent also filed two witness statement made by Eunice Ayodo and Cyprian Nyakundi on 18/01/2019 and 20/01/2019 respectively. Eunice states that the Respondent expressly informed the Petitioner of the decision to promote and transfer him on merit and that he was also informed of the approved HR Policies and Procedures Manual which had set in motion the process of reorganisation and restructuring.

23. She contends that contrary to the Petitioner's allegations, the Respondent has always offered the Petitioner equal training opportunities in form of short term trainings and that in 2013 it approved sponsorship of postgraduate studies programme for the Petitioner, which resulted in conferment of his Masters degree. She also states that the Respondent is an equal opportunity employer who treats all its employees fairly and that the impugned disciplinary process against the Petitioner was procedurally and substantively fair and took into consideration all material facts.

24. Cyprian Nyakundi states that the insubordination incidences the subject matter of the Petitioner's dismissal occurred on 03/08/2018 and 11/09/2018 when on both occasions the Petitioner went into his office and started shouting, hurling insults at him while threatening his life and accused him of having procured his transfer to his new work station. That he accused him of several false allegations and when he requested him to leave his office, the Petitioner wanted to fight him but later banged the door and left. That he then reported the matter to the Human Resource and Administration Manager and the Director General and which behaviour culminated in him recording an official statement at the Capitol Hill Police Station after the Petitioner was arrested.

Petitioner's Submissions

25. The Petitioner submits that termination of contracts should only be where there are reasons that the employer at the time of terminating such a contract genuinely believed to exist. He refers to **Section 43 of the Employment Act** and submits that even where there are genuine reasons leading to the termination, the same must be assessed as to its validity, fairness and reasonableness. That the reasons should further be with regard to the conduct of the employee, the policy procedures given by the employer and fundamentally the procedures adopted by the employer leading to the termination. That even in cases of gross misconduct and with the employer having sufficient reasons to terminate an employee, such employee should be given a fair hearing before the decision to terminate their employment is made.

26. That in this case it should be noted that he was terminated on account of alleged use of abusive language, behaving in inappropriate manner and insubordination. He submits that there were no fair and valid reasons to warrant his dismissal from employment and his actions did not amount to gross misconduct.

28. That the Respondent must adduce evidence of the word he used which the supervisor felt was insulting to prove the allegations of use of abusive language. That however where the Respondent fails to adduce the specific word used, the Court should hold that the allegation of use of abusive language as not proven as similarly held in the Court of Appeal case of **CMC Aviation Limited vs Mohammed Noor [2015] eKLR**. He submits that the Respondent merely picked general provisions under Section 44 in order to cover up its real retaliatory reasons for the summary dismissal.

28. He further submits that the Respondent's actions amounts to acts of discrimination and unfair labour practices and speaks to the real reasons for the Petitioner's summary dismissal hence unlawful under **Section 46 (g & h) of the Employment Act** and **Articles 27,41 and 236 of the Constitution of Kenya**. That the Respondent contravenes **Section 11.4.1 (c) of the Human Resource Manual** that provides: *"The determining authority must be unbiased when hearing and making decisions"*.

29. On the allegation of insubordination, the Petitioner submits that the Respondent did not provide any particulars as regards the legitimate and lawful instructions that the Petitioner allegedly refused to follow. That this position was reiterated in the case of **Abraham Gumba vs Kenya Medical Supplies Authority [2014] eKLR** where the Court held that an employer who alleges insubordination as a ground for dismissal must provide particulars of insubordination.

30. He submits that he has addressed the burden of proof placed upon it by **Section 47(5) of the Employment Act** but the Respondent has not rebutted the same, including providing the mobile clip that Mr. Nyakundi allegedly recorded on 11/09/2018.

31. That the Respondent has withheld all verifiable information even after this Honourable Court ordered the same to be supplied to the

Petitioner and that such failure to support its allegations is an admission of guilt to false accusations against the Petitioner. That the reasons advanced and leading to his termination were not valid and fair thus there was no justifiable cause for his summary dismissal.

32. It is submitted by the Petitioner that he was not accorded due procedure before the decision to summarily dismiss him was taken as required under **Section 41 of the Employment Act** and **Article 50 of the Constitution**. He relies on the appellate cases of **Kenfreight (E.A.) Limited vs Benson K. Nguti [2016] eKLR** and **Samsung Electronics East Africa Ltd vs K M [2017] eKLR** and the case of **Anthony Mkala Chitavi vs Malindi Water & Sewerage Company Ltd [2013] eKLR**.

33. The Petitioner submits that Respondent further acted in total contravention of **Section 44(4) and 45 of the Employment Act, Section 4(3) (a) of the Fair Administrative Action Act, Section 2.1 (b) (ii) of the Public Service Discipline Manual (May 2016), Section 69(4) (a) of the Public Service Commission Act, 2017 and Section 11.4.1 (f) (ii) of the Respondent's Human Resource Policy and Procedures Manual (May 2018)**. He faults the whole disciplinary process that was instituted against him for not strictly adhering to the procedure as under the Respondent's HR Manual of May 2018.

34. Further, that the Respondent failed to give him prior and adequate notice on the nature and reasons for the intended action and an opportunity to be heard and make representations. That he was therefore entitled to administrative action which was not only procedurally fair and lawful but reasonable as under **Article 47 of the Constitution**.

35. He also submits that the DG who has the powers to review his appeal took away his right of appeal by showing his hand too early and that this was the position in the case of **Republic vs University of Nairobi Ex parte Michael Jacobs Odhiambo & 7 others [2016]**. That that the same members of HRAC that condemned him unheard could not meritoriously reconsider their previous decision, as the same would be tantamount to sitting on their own appeal, which is not tenable in law.

36. On the violation of his constitutional rights, the Petitioner relies on **Katiba Institute vs Presidents Delivery Unit & 3 others [2017] eKLR** which dealt with the right to access information and the value of the rule of law under Articles 10 and 35; the case of **Jacques Charl Hoffman vs South African Airways 11BCLR 1211-1234 (CC)** on discrimination which is prohibited under Article 27; the case of **Robert Muriithi Ndegwa vs Minister for Tourism [2012] eKLR** on fair administrative action, the principles of public service and protection of public officers under Articles 47, 232 and 236; the case of **Judicial Service Commission vs Gladys Boss Shollei & Another [2014] eKLR** on the right to fair trial under Article 50; and the Supreme Court case of **Communications Commission of Kenya & 5 Others vs Royal Media Services [2014] eKLR** on the violation of the doctrine of legitimate expectation. It is the Petitioner's submission that he had a legitimate expectation that the Respondent would follow the law in taking disciplinary action against him.

37. The Petitioner submits that this Court is mandated by the Constitution and by Statute to grant the orders and reliefs he has sought in his Petition. That reinstatement is an equitable relief envisaged under **Section 49(3) of the Employment Act** with the conditions, which the Courts must consider before granting such orders set out at **subsection 49(4)**. He invites the Honourable Court to hold that the common law principle against specific performance in employment contracts must align itself to **Article 236 of the constitution** that protects public officers against victimization, subjection to unlawful disciplinary action and removal from office without due process of law. That he stands to lose his Kitengela home which was purchased under the Respondent's Cash Backed Scheme and that he is yet to secure any other employment or get comparable employment due to the current economic situation occasioned by Covid 19.

38. On the claim for damages for discrimination, he relies on the appellate case of **Ol Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR**, which upheld the decision of the superior court that awarded damages for discrimination at Kshs. 18 Million. That further in **Miriam Wambui Thiriku v Bomas of Kenya (2017) eKLR**, the Court awarded the claimant Kshs. 500,000 for unfair labour practice in violation of Article 41 of the constitution.

39. He submits that he deserves to be paid constitutional rights violation damages of Kshs 5 Million in view of the decisions of the court in the above cited authorities. That as a consequence of the irresponsible conduct of the Respondent, he deserves to be granted the prayers sought in the Petition. As for costs, he urges the Court to be persuaded by the case of **Cecilia Karuru Ngayu vs Barclays Bank of Kenya & another [2016] eKLR** and grant him costs and interest in the case.

Respondent's Submissions

40. The Respondent submits that **Sections 41 and 44 of the Employment Act** provide for the procedure to be adhered to when a disciplinary issue arises and that the employee ought to be informed of the allegations against him and offered the opportunity to defend himself as dictated by the rules of natural justice. That in the celebrated case of **Mckenzie vs Smith (1976) IRLR 345**, it was pronounced that suspension/interdiction of an employee, within the employment relationship, generally under common law must have a contractual basis.

41. It submits that it interdicted the Petitioner from duty in compliance with **Section 11.12.1 of the Human Resource Manual** to facilitate investigations into his case and pave way for disciplinary proceedings if warranted and then issued him with a Show Cause pursuant to **Section 11.5.1 (e) of the Human Resource Manual**.

42. That the Petitioner submitted his written representations which ordinarily would equally suffice as a fair hearing and/or opportunity to be heard as was held by Court in **Kenya Revenue Authority vs. Menginya Salim Murgani, Civil Appeal No.108 of 2010**. That it also considered his presentations before the disciplinary committee and determined that he was guilty of gross misconduct and thus summarily dismissed him pursuant to **Section 12.4 of the Human Resource Manual** and **Section 44 of the Employment Act**.

43. The Respondent submits that it has demonstrated in its Response to the Petition that there were fair and valid reasons to justify institution of a disciplinary proceeding and a hearing that culminated in the Petitioner's summary dismissal. That as was espoused in the case of **Kenya Revenue Authority v Reuvel Waithaka Gitahi & 2 others [2019] eKLR, Civil Appeal No. 66A of 2017** the Court of Appeal determined that the standard of proof is on a balance of probability, not beyond reasonable doubt and all the employer is required to do is to prove the reason it "genuinely believed to exist" causing it to terminate the employee's services. That further in the case of **Jacob Oriando Ochanda v**

Kenya Hospital Association Ltd t/a Nairobi Hospital [2019] eKLR the Learned Judges of Appeal espoused that where an employee fully participates in the hearing but chooses not to be accompanied by a colleague and/or adduce witnesses then the hearing shall be deemed to have been conducted fairly.

44. It submits that Courts have to be cautious in ordering for reinstatement of an employee and that the Court of Appeal in **Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** held that Courts ought to be guided by the common law principle that specific performance in an employment contract should not be ordered except in very exceptional circumstances. The appellate Court went on to say that the Court should balance the interest of the employee and that of the employer.

45. That in this case, the Court should consider that it is a public institution that ought to abide by the provisions of **Article 10 of the Constitution** and **Section 5 of The Public Service (Values and Principles) Act**. That to this extent the Petitioner has not demonstrated these exceptional circumstances to warrant his reinstatement.

46. The Respondent submits that the Petitioner is seeking an equitable remedy for an order of specific performance upon the employment contract. That it is trite law that he that comes to equity must come with clean hands and must do equity but the conduct of the Petitioner betrays him and does not endear him to the reliefs and/or equitable remedies he seeks. This is because the Petitioner grossly misrepresented and/or misdirected this Honourable Court in obtaining interim orders that he had obtained a mortgage from KCB at the time of his summary dismissal and risks losing his home.

47. That the Petitioner further misrepresented that KCB had informed him they could not disburse the loan by reason that they were made aware he was no longer an employee of the Respondent. That the Petitioner's conduct has therefore been mischievous and self-serving and does not emulate a person who comes to equity and in this regard, it relies on the case of **Kawaljeet Singh Rekhi v Peter Wainaina Kamau & 2 others [2016] eKLR**. It beseeches this Court to find and determine that the Petitioner did not come to equity with clean hands and therefore does not deserve the equitable remedy he seeks.

48. The Respondent submits that the investigation report does not bear any legal standing and/or probative value because:-

i. It was not sanctioned and/or required by the Honourable Court;

ii. There is no legal nexus between the alleged investigation firm and the court process;

iii. It has not been accordingly certified pursuant to the Rules of Evidence especially Sections 65 & 66 of the Evidence Act;

iv. It has neither been adduced by the maker nor presented through a witness statement contrary to Section 35 of the Evidence Act;

v. The alleged investigation report neither outlines its parameters and methodology of investigation nor does it highlight the witnesses alleged to have been interviewed; and

vi. The credentials of the alleged maker have not been annexed in order to persuade this Honourable Court of his expertise in the relevant field.

49. That contrary to the provisions of **Section 107 of the Evidence Act**, the Petitioner purporting that the alleged investigation report vindicates him does not attain the relevant threshold and ought to fail.

50. It submits that the provision of **Section 11.9.8 of the HR Manual** cited by the Petitioner in his submissions is for minor offenses and not gross misconduct and that the Petitioner has failed to discharge a high standard of proof to attain the threshold for demonstration of bias.

51. The Respondent further submits that the Petitioner has not attained the threshold as set in the celebrated case of **Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272** where it was pronounced that when there is a claim based on violation of a Constitutional right, the Applicant/Petitioner ought to frame their case and/or complaint to a reasonable degree of precision to ensure that justice is sufficiently delivered.

52. That it is the Petitioner who is in breach of the employment contract by reason that he acted in a manner of gross misconduct and constructively denied to exhaust and/or submit to the Respondent's internal disciplinary process. That consequently the court should very sparingly interfere with the Respondent's entitlement to perform its human resource functions and dismiss the Petition with costs to the Respondent.

53. I have examined all the evidence and submissions of the Parties herein. The issues for this Court's determination are as follows:-

1. Whether there were valid reasons to terminate the Petitioner's services.

2. Whether the Respondent followed due process before terminating the Petitioner.

3. Whether the Petitioner's rights under the Constitution were infringed upon.

4. Whether the Petitioner is entitled to remedies sought.

Issue No. 1

54. On 18/9/2018, the Petitioner was served with an interdiction letter dated 17/9/2018 indicating that he used abusive language and behaved in an inappropriate manner and insubordinated the Acting Director, Enforcement & Consumer Protection.

55. The interdiction was to subsist pending investigations. Vide a letter dated 2/10/2018, the Petitioner was also served with a show cause letter and he replied to it vide a letter dated 9/10/2018 denying allegations levelled against him and pointing out that the matter complained against him arose from his previous communication to his superior complaining about the way he had been treated before.

56. The Petitioner was even charged with offence of creating a disturbance contrary to Section 95(1) (b) of Penal Code and the complainant was also his boss. He was presented in Court on 13/9/2018.

57. After this, the Claimant was invited for a disciplinary hearing before the Human Resource Advisory Committee (HRAC) on 19/10/2018 at 9 am.

58. The Petitioner wrote to the Chief Human Resource Advisory Committee in relation to this meeting seeking to be supplied with certain documents including the report of the Human Resource Advisory Committee (HRAC) on his conduct referred to in the show cause letter of 2/10/2018, and also CCTV footage on the 2nd floor on 7th and 10th September, 2018. He also sought evidence relied upon to conclude the misconduct.

59. The Respondent replied vide a letter dated 15/10/2018 and indicated that the information requested would not be available to him as the report was purely for internal use and that there was no CCTV footage where he allegedly misconducted himself.

60. The Petitioner was then orally heard on 19/10/2018 by before the Human Resource Advisory Committee (HRAC) and was then found guilty and dismissed vide a letter dated 8/11/2018.

61. I have taken time to list the chronology of events that took place from the time of alleged misconduct to the time of dismissal of the Claimant to bring out what the reasons of the Claimant's dismissal were and whether he was accorded any proper disciplinary hearing.

62. In their response to the Petitioner, the Respondents attached the Human Resource Manual and report of the Human Resource hearing of the Petitioner on 19/10/2018. Minutes of the disciplinary hearing were however missing.

63. There is definitely a difference between a report of a disciplinary hearing and minutes of a disciplinary hearing. Minutes indicate verbatim what has been stated and by who as opposed to a report which is a subjective view of the writer on the events of the meeting. In the case of the Petitioner, minutes of the meeting are missing.

64. The Committee recommended disciplinary action against the Petitioner. Another report exhibited by the Respondent concerns a meeting held on 13/9/2018. The meeting found the Petitioner culpable and recommended disciplinary action against him as provided for under Section 11.7.1(iii) (c) & (d) of the Human Resource Manual (May 2018). Section 11.7.1(iii) (c) & (d) of the Human Resource Manual deal with gross misconduct.

65. Despite the misgivings in the process leading to the dismissal of the Claimant, there is evidence that the Petitioner was also charged before a Criminal Court with the same offence that led to his dismissal, which relate to creating a disturbance. The results of the criminal case have however not been disclosed.

66. Section 43 (1) of the Employment Act provides as follows:-

1. "In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45".

67. Under the law, reasons for dismissal must be in existence at the time a dismissal or termination is done and which must indeed be seen to exist.

68. The Respondents have chosen to rely on reason that the Claimant abused his superior without indicating the words used in the abuse. In **CMC Aviation Limited vs Mohammed Noor (2015) eKLR**, the Court of Appeal indicated as follows:-

"Since the burden of justifying the ground for summary dismissal lies upon an employer, had the Appellant cited the abusive words the Court would have had occasion to consider whether the words in their natural meaning or in the circumstances in which they were uttered they amounted to "abusive or insulting language".

69. Indeed, in the current case, the abusive words uttered to the complainant have not been disclosed even during the disciplinary hearings of the Petitioner. The exact words used having not been disclosed before the time of dismissal, any words disclosed in complaints evidence were an afterthought and I treat them as such.

70. As concerns insubordination, it is also not disclosed what the Petitioner was asked to do and which he failed to do. The complaints of insubordination therefore remain to be proved. Infact in the show cause letter and in the dismissal letter, acts or omissions considered as insubordination have not been disclosed. This was the holding of my brother Rika Judge in Abraham Gumbo vs KMSA (2014) eKLR and which I agree with. It is my view that the dismissal of the Petitioner lacked valid reason.

Issue No. 2 – disciplinary process

71. As concerns the process meted against the Petitioner, the Petitioner was indeed issued with a show cause letter and he responded. He was thereafter invited for a disciplinary hearing and in the process requested for certain documents and evidence used against him. The Respondents declined to grant his request indicating that the evidence was for their own internal consumption.

72. This definitely impacted on the Petitioner’s right to a fair hearing as provided for under the Fair Administrative Action Act.

73. Section 3(a) of the Fair Administrative Action Act states as follows:-

a. “Prior and adequate notice of the nature and reasons for the proposed administrative action”. and Section 3(g) states as follows:-

g) “Information, materials and evidence to be relied upon in making the decision or taking the administrative action”.

74. The above were not given to the Petitioner as indicated in his evidence.

75. Section 6(1) of the Fair Administrative Action Act also provide as follows:-

6(1) “Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with section 5”.

76. When the Petitioner requested for certain information, he was denied the same and so he was denied his right to a fair hearing.76.

77. Section 41 of Employment Act 2007 states as follows:-

1. ““Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

78. Section 45(2) of the Employment Act 2007 also provide as follows:-

2. “A termination of employment by an employer is unfair if the employer fails to prove:-

a. that the reason for the termination is valid;

b. that the reason for the termination is a fair reason:-

i. related to the employee’s conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

c. that the employment was terminated in accordance with fair procedure”.

79. In the case of the Petitioner herein, fair disciplinary hearing was not accorded to him and therefore his dismissal was unfair and unjustified.

Issue No. 3 breach of constitution rights

80. Given that the Claimant was not given a fair hearing and that the Respondents have not established presence of valid reason before his dismissal, it also follows that his rights under the Constitution were breached.

81. The Petitioner cited breach of Article 47 of the Constitution which provides as follows:-

1. "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall:-

a. provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

b. promote efficient administration".

82. Indeed the right of the Petitioner under Article 47 of the Constitution was breached as he was dismissed without following due process.

Issue No. 4 – Remedies

83. Following my finding above, I make the following orders and declaration:-

1. The decision to dismiss the Petitioner from the service of the Respondent was unfair and unjustified and in contravention of Article 41 and 47 of the Constitution.

2. That the Petitioner is entitled to payment of his back pay from the time of dismissal to date.

3. The Petitioner be paid 2 million as damages for the unfair and unjustified termination.

4. The Petitioner be reinstated or be re-engaged in his employment from the date of this judgement.

5. Respondent to 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 15th day of October, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Abdullahi Omari (Petitioner) – Present

Mose holding brief Muyuri for Respondent – Present