



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO. 110 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF ARTICLES 1(3)(c), 2(1) & (4), 3(1), 19, 20(3) & (4), 21(1) & (3), 22(1) & (2)(c), 23(1) & (3), 159, 162(2)(a), 165(3), (d)(i), (ii), (4), (6) & (7), 258(1) & (2)(b) & (c) 1 AND 259(1), (2)(b) & (11) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTION 4, 12(1)(a), (2), (3) & (4), 20, 21 AND 35 OF THE INDUSTRIAL COURT ACT, 2011**

**AND**

**IN THE MATTER OF SECTION 5(1), (2), (3), (4), 5) & (6), 9(2) & (3), 10(1), (2) & (5), 35(2) & (4)(a), 36, 41, 43, 44(2) & (4), 45, 47(3) & (5), 49, 50, 51, 75, 75 AND 87 OF THE EMPLOYMENT ACT, 2007**

**AND**

**IN THE MATTER OF SECTION 3(a) & (c), 4(1), (2), (3), (4) & (6), 6, 12 OF THE FAIR ADMINISTRATIVE ACT, 2015**

**AND**

**IN THE MATTER OF SECTION 3, 4(a), 5 AND 7(1) OF THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT, 2015**

**AND**

**IN THE MATTER OF SECTION 7, 8, 9(a), (b), (d), (d) & (g), 10, 17, 18, 19, 22(a) AND 24 OF PUBLIC OFFICER ETHICS ACT, 2003**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES: 19, 20(1), (2) & (4), 21(3), 24(1) & (3), 25(a) & (c), 27(1), (2), (3), & (5), 28, 29(d) & (f), 35(1)(b) & (2), 41(1) & (2)(a) & (b), 47(1) & (2) AND 236 AND THE ALLEGED VIOLATION OF ARTICLES 2(1) & (4), 3(1), 10, 73(2), 201(d) 258(1) & (2)(b) & (c) 1 AND 232(1),(a), (e), (f), (g), (i), )j) & (2) OF THE CONSTITUTION OF KENYA, 2010**

***BETWEEN***

**KELLY MARINA KOKUAL.....PETITIONER**

***VERSUS***

**KAJIADO COUNTY**

**ASSEMBLY SERVICE BOARD.....RESPONDENT**

**JUDGMENT**

The Petitioner was employed by the Respondent as a procurement assistant on 1<sup>st</sup> April 2014. Her employment was confirmed on 7<sup>th</sup> July 2014 and she was appointed as a procurement officer (KCASB) 8, in acting capacity.

On 29<sup>th</sup> April 2016, the Clerk of Kajiado County Assembly, Mr. Daniel Konyango, changed the Petitioner's reporting structure and placed her under the Director Finance and Compliance, but she protested the change on 20<sup>th</sup> May 2016.

On 6<sup>th</sup> June 2016, the clerk revoked the new reporting structure and promoted Philip Martine Muteleu from assistant procurement officer to procurement officer and the Petitioner's roles transferred to him.

On 12<sup>th</sup> July 2016, the Clerk appointed a committee to investigate the procurement unit's records. The Committee conducted its investigations and submitted a report to the clerk for further action.

On 11<sup>th</sup> October 2016, the Petitioner was issued with a notice to show cause on the grounds that she had misplaced and mutilated official records; neglected to perform her procurement duties; refused to obey lawful and proper command and used abusive language towards her seniors. She responded to the notice on 13<sup>th</sup> October 2016 denying the allegations and contended that she never signed any performance contract for 2015/2016 and 2016/2017 financial years neither had the Board evaluated her performance since July 2014. She also requested for details and evidence of her alleged negligence and carelessness.

The Respondent did not respond to her request for information. On 26<sup>th</sup> January and 7<sup>th</sup> February 2017, she was summoned to appear before the Disciplinary Committee on 9<sup>th</sup> February 2017 at Portland Sports Club. She attended the disciplinary proceedings before the committee. However, the meeting was called off due to the objections raised by the Petitioner regarding the constitution of the Committee.

On 10<sup>th</sup> February 2017, she was once again summoned to appear before a Disciplinary Committee on 15<sup>th</sup> February 2017 at Portland Sports Club which constituted the previous members save for Julia Mutua and Benjamin Rapaine who were absent.

The proceedings were again aborted when the Committee's jurisdiction was challenged by the Petitioner. However, the Committee held meetings at the KCB Leadership Centre at Karen where the Speaker, the Clerk, Faith Kilakoi Sialala who was the Director of Finance and James Ntele appeared as witnesses.

The Committee wrote a report recommending that the Petitioner's employment be terminated. The Report was handed over to the Respondent and on 27<sup>th</sup> February 2017 the Petitioner was summarily dismissed. It is the Petitioner's position that the Speaker, the Clerk, the Member of the Public, Leader of Majority and Minority were conflicted.

On 27<sup>th</sup> March 2017, the petitioner appealed against the Respondent's decision. On 11<sup>th</sup> April 2017, the Respondent upheld its decision. On 19<sup>th</sup> April 2017, the Petitioner made an appeal to the Public Service Commission but the same was withdrawn on 13<sup>th</sup> December 2017 due to the Commission's inaction.

This suit was commenced vide the Petition dated 3<sup>rd</sup> August 2016 and filed on 4<sup>th</sup> August 2016. The Petitioner amended the petition severally vide the Amended Petitions filed on 31<sup>st</sup> May 2018, 23<sup>rd</sup> July 2018 and 18<sup>th</sup> January 2019. The final Amended Petition that is the subject of this determination is the one dated 18<sup>th</sup> January 2019 wherein the Petitioner seeks the following orders: -

- a. A declaration that the Respondents are bound by Article 3(1) and 10 of the Constitution.
- b. A declaration that the Petitioner is entitled to the rights guaranteed by article 27, 29(d), 41, 47 and 236 of the Constitution.
- c. A declaration that the Respondents contravened the Petitioner's rights guaranteed by article 27, 29(d), 41, 47 and 236 of the Constitution.
- d. A declaration that the Respondents have abrogated the Constitution by violating article 3(1), 10, 73 and 232 thereof.
- e. A declaration that the Respondent's actions and conduct complained of are null and void and of no legal effect.
- f. A declaration that the Disciplinary Committee lacked jurisdiction.

- g. A declaration that the Disciplinary Committee was conflicted and malicious.
- h. A declaration that the Respondent violated the rules of natural justice.
- i. An order to reinstate the Petitioner without loss of income, powers, privileges and rights.
- j. An order that in the alternative the Respondent do pay the Petitioner 12 months' gross salary as compensation for unlawful termination.
- k. An order to compel the Respondent to pay damages to the Petitioner to compensate for contravening her constitutional and statutory rights.
- l. An order that the Respondent do pay the interest at commercial banks rate until payment in full.
- m. An order that the Respondent do pay the costs of this Petition plus interest thereof until payment in full.

The Respondent has opposed the Petition vide the Replying Affidavit of Daniel Owino Konyango, sworn on 3<sup>rd</sup> October 2016 and filed on even date.

### **The Petitioner's Case**

The Petitioner avers that on 2<sup>nd</sup> June 2016, the clerk through Charles Lenge'te processed payment for Global Track for investigation services which had been procured unlawfully. She avers that on 3<sup>rd</sup> June 2016, she advised the clerk against unprocedural procurements.

As regards the appointment of Philip Martine Muteleu as Procurement Officer to replace her, it is her position that he was unqualified to hold the position of a procurement officer by dint of Section 20(1) of the Supplies Practitioner Management Act 2007 and Sections 2(1) and 47(1) of the Public Procurement and Asset Disposal Act 2015.

The Petitioner deposes that in June, she declined the Speaker's request to procure goods and services unprocedurally. Subsequently, her office cabinet was broken into and official files stolen. She reported the incident to the Head of the Sergeant at Arms for investigation. She was later informed by Mr. Muteleu on 1<sup>st</sup> July 2016, that it was he, the Clerk and the Kajiado County Assembly Senior Administration Officer who broke into her office cabinet.

The files were later found in the custody of Mr. Muteleu. The Petitioner avers that Mr. Konyango broke and changed her office locks and directed her to work from the driver's office. That she proceeded on leave in 18<sup>th</sup> July 2016 which was to subsist until 1<sup>st</sup> August 2016.

On 27<sup>th</sup> July 2016, the Respondent advertised the position of senior procurement officer which had been assigned the Petitioner's roles and responsibilities.

The Petitioner avers that at the meeting of 9<sup>th</sup> February 2016, the Committee members refused to identify themselves and locked out the Petitioner's advocate and official of the Kenya County Government Workers Union. Instead, they called off the meeting.

The Petitioner avers that she did not know about the witnesses who testified on 15<sup>th</sup> February 2017, or the contents of their testimony. She avers that on 20<sup>th</sup> February 2017 her Union protested the constitution of the Committee that sat at the hearing.

It is the Petitioner's position that the Respondent's actions violated the provisions of Articles 3(1); 10(1)(c) and (2); 73(1) and (2)(b), (d) and (e); 27(1), (2), (4) and (5); 29(d); 41(1) and (2); 47(1); 232(1)(a), (e), (f) and (2)(a), and 236 of the Constitution.

### **The Respondent's Case**

In his Affidavit, Mr. Konyango avers that once he informed the procurement unit of the changes made by the Public Procurement and Asset Disposal Act 2015, the Petitioner started resisting new changes.

He avers that he requested the Petitioner and Mr. Muteleu to register with the Kenya Institute of Supplies Management for them to be qualified to handle the Assembly's procurement activities, as required by Section 2 of the Act. He avers that Mr. Muteleu complied with his directions and availed proof of registration which was confirmed to be valid by the said Institute.

The Petitioner did not provide proof of her registration hence should not refer to herself as a procurement professional. Further, it is posited that as an employee of the county government, Mr. Muteleu does not require a practicing license to carry out procurement activities.

It is averred that the Respondent held a meeting to deliberate on Kajiado County Assembly's compliance with the Act and it was resolved that Mr. Muteleu be promoted to Procurement Officer KCASB 8 and the procurement roles assigned to him.

The Petitioner was aggrieved by this decision and endeavoured to sabotage Mr. Muteleu's work. As such, the Respondent resolved that her duties would be coordinated from the Department of Finance, to avoid the conflict.

It is averred that procurement procedures were followed to the letter and that if the procurement of the services of Global Track Limited were done unlawfully, then it was due to the Petitioner's illegal acts of misrepresenting herself to the Assembly as a procurement professional.

The affiant further contends that the Petitioner was responsible for procurement hence likely to have doctored the documents. It avers that the Petitioner admitted to presiding over illegal and fraudulent practices in the procurement unit.

The Affiant denies disabling the petitioner's IFMIS account on 6<sup>th</sup> June 2016 as alleged at paragraph 11 of the petitioner's affidavit and contends that he does not have the mandate to disable any financial systems. He avers that the IFMIS accounts are controlled by the National Treasury. He also denies the allegations by the Petitioner that she refused to perform the duties assigned to her because procurement functions were being handled by Mr. Muteleu.

It is contended that the Petitioner shared an office as well as the cabinets with Mr. Muteleu and Irene Nyambura Kinyanjui. Further, the Assembly's procurement's files were handled by 3 employees in the procurement unit hence no individual had a specific file allocated to them.

The Affiant denies the allegations that the Petitioner's cabinet was broken into by Mr. Muteleu or at all and questions her decision to report to the Sergeant at Arms instead of him or the County Assembly Board. He also denies the allegation that the Petitioner was directed to work from the driver's office. He contends that the procurement office was secured for investigation and the officers relocated to other offices within the Assembly. The Petitioner and Ms. Irene sat in the store's section adjacent to the driver's room while Mr. Muteleu worked from a committee room.

It is averred that upon receipt of the Petitioner's letter regarding backdating of the procurement process, he reported the matter to the Board which directed that an investigatory audit be carried out. Consequently, a committee was appointed, conducted its investigations, and found that documents were being pilfered and files missing from the procurement unit.

It is the Respondent's case that the position of Senior Procurement Officer, KCASB 9 has always been in the Assembly's structure but has never been filled. It is contended that the decision to fill the position was aimed at complying with the law. It is further contended that the Petitioner does not qualify for the position since she holds no degree.

### **The Petitioner's Rejoinder**

The Petitioner filed a Further Affidavit sworn on 1<sup>st</sup> November 2016, as a response to the Respondent's Replying Affidavit.

She contends that her position was described as a procurement officer and not an acting procurement officer. She contends that she resisted reporting to the Director Finance and Compliance as it was contrary to section 2 of the Act.

She denies being requested to register with KISM and avers that she is a procurement professional and has been a member of KISM since October 2013 which certificate is in her personal employment file. She avers that registration with KISM was an employment requirement. It is her position that Mr. Muteleu is not a procurement professional.

The Petitioner contends that the Respondent was responsible for the illegal procurement of the security services and not the procurement department. Further, that the Respondent coerced Mr. Konyango to forge the evaluation reports and the procurement opinion of 19<sup>th</sup> January 2016. She advised him to stop forging the same, but he forged quotations from Famizizi Consulting and McKaine Strat Consulting.

It is averred that Mr. Konyango issued LPO No. 1083068 of 17<sup>th</sup> June 2016, to Mycur Enterprise Limited without following the procurement procedure. She refused to approve the payment through IFMIs, prompting him to add Mr. Muteleu as a purchase order approver.

She avers that pursuant to section 2 of the Act, the procurement function reports to the Clerk of the National Assembly. She avers that she is unaware of any provision exempting any employees or Mr. Muteleu from registration and licensing by KISM.

She denies sharing an office and cabinets as alleged in the Replying Affidavit. She explains that the Sergeant at Arms oversees internal security hence reporting the theft incident to him was proper. She avers that the investigating committee absolved her from any wrongdoing.

She maintains that she is a senior procurement officer, a fact that is within the knowledge of Mr. Konyango who oversees the payroll. She contends that she was qualified to hold the position of senior procurement officer hence ought to have been promoted. She also avers that the Respondent should not have advertised for her position while she was still serving.

The Petition was disposed of by way of written submissions where the Petitioner filed her submissions on 11<sup>th</sup> February 2019. There is NO record of the Respondent's submissions in the court file.

### **The Petitioner's Submissions**

The Petitioner submits that the Respondent's conduct violated the constitutional values and principles as well as her human rights and

fundamental freedoms. As such the Petition is ripe to be decided by this Court. She relies on the case of **Hon Kanini Kega v Okoa Kenya Movement & 6 Others [2014] eKLR** where the Court observed that if public officers fail to act within the law and their failures harm the interests of the public and rights of individual citizens, their actions and omissions are subject to judicial review.

The Petitioner submits that she discharged her burden of proof as required by Section 47(5) of the Employment Act since she was summarily dismissed without being issued with any evidence to support the allegations against her as had been requested in her response. She posits that the Respondent has failed to discharge its burden of proof by failing to provide evidence to support its decision to summarily dismiss the Petitioner.

She relies on the case of **CMC Aviation Limited v Mohammed Noor [2015] eKLR** where the Court of Appeal found that the appellant having failed to prove that the Respondent used abusive language towards the Human Resource Manager, failed to discharge its burden of proof hence acted unfairly.

It is the Petitioner's submission that the disciplinary committee having been constituted of individuals who were not members of the Respondent, was improperly constituted hence lacked jurisdiction. She has cited the case of **James Omariba Nyaoga & Another v Speaker of the County Assembly – Kisii County & 2 Others [2016] eKLR** where the Court held that under section 41 of the Employment Act, there is no requirement that the employer can source for independent panellists from outside its employment to hear disciplinary cases against its employees.

As regards the reliefs sought, the petitioner submits that she is entitled to the declaratory orders sought since Article 23(3)(a) of the Constitution and Section 12(3)(iv) of the Employment and Labour Relations Court Act empowers this Court to grant declaratory orders.

She submits that she is entitled to reinstatement since Sections 12(3)(vii) of the Employment and Labour Relations Court Act as read with Sections 49(4)(a) and 50 of the Employment Act gives this Court the power to grant an order for reinstatement within 3 years of termination without loss of income, powers, privileges and rights. The Petitioner contends that Mr. Konyango was dismissed, as such, she will be comfortable to work with other staff.

It is the Petitioner's submissions that pursuant to Section 49(1)(c) of the Employment Act, this Court can award her 12 months' gross salary compensation for unfair termination.

#### **Analysis and Determination**

I have carefully considered the petition and the affidavits in support thereof, the Respondent's Replying Affidavit, annexures to the respective affidavits and the Petitioner's submissions. The issues for determination are-

- a. Whether the termination of the Petitioner's employment was lawful, fair and for a justified reason.
- b. Whether the Petitioner is entitled to the reliefs sought.

Section 41 of the Employment Act requires an employer who intends to dismiss an employee on the ground of gross misconduct to explain to her in the presence of a shop floor union representative or a colleague, the reason they are considering such termination and give her an opportunity to make her representations. Section 44(4) lists actions that amount to gross misconduct as follows –

**(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—**

**(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;**

**(b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;**

**(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;**

**(d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;**

**(e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;**

**(f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or**

**(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.**

Section 44(4)(c), (d), (e) and (g) formed grounds (ii) to (iv) of the allegations that the Petitioner was charged with and which eventually led to the termination of her employment.

The Petitioner submitted that her summary dismissal was unfair since she was not afforded a hearing before she was summarily dismissed. That the disciplinary proceedings were conducted in a secret place without notice to her.

It is now trite law that an employee must be afforded the opportunity to be heard even in the case of a summary dismissal. [See **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR**]. Further, the Court in **Walter Ogal Anuro v Teacher Service Commission [2013] eKLR**, stated that for a termination to pass the fairness test, it must be shown that there was substantive justification for the termination and procedural fairness. I will therefore examine the disciplinary procedure adopted.

The Petitioner averred that the disciplinary committee was improperly constituted hence lacked the jurisdiction to conduct her disciplinary proceedings. It was her case that the first disciplinary committee consisted of Benjamin Rapaine, Julia Mutua, Fiona Lugonzo, Leboo Saisa, Jemimah Mateu Kilesi, Daniel Tyong, Rebecca Tonkei who was an employee of the National Assembly, James Kuya Nina who was a member of the Kajiado County Assembly and two other individuals who were strangers and not employees of the Respondent.

She further averred that on 10<sup>th</sup> February 2017, she was summoned to appear before a Disciplinary Committee on 15<sup>th</sup> February 2017 at Portland Sports Club which constituted of the previous members save for Julia Mutua and Benjamin Rapaine who were absent.

The Petitioner challenged the constitution of the Board but failed to provide this Court with evidence of what amounted to a properly constituted board. It was not enough to allege that the constitution was improper and contrary to the Human Resource Manual which provided that a disciplinary committee should consist of the Speaker of the Assembly as the Chairman, the Leader of Majority and Minority in the Assembly and a member of the public as members; with the Clerk of the National Assembly as the secretary. She ought to have adduced the Human Resource Manual for this Court to appreciate the contents of the same for an understanding of what amounted to a properly constituted Board.

In the absence of evidence to justify the Petitioner's allegations that the Board was improperly constituted, the same remain to be mere allegations.

It was common ground that the Petitioner failed to submit herself to the disciplinary proceedings that had been commenced to interrogate her behaviour and evaluate whether her employment ought to be terminated on grounds that the Board had been improperly constituted.

Since she failed to prove that the Disciplinary Committee was improperly constituted or to submit herself to the Committee, the Petitioner is estopped from disputing the outcome of the disciplinary proceedings. In the case of **Patrick Nyongesa Makokha v Teachers Service Commission & Eldoret Polytechnic [2019] eKLR** the Court observed as follows–

*“In this case, the court finds the 1<sup>st</sup> respondent followed due process as set out under section 41 of the Employment Act, 2007 and the claimant neglected and or ignored attending to defend himself. He cannot blame the respondents over his own actions. To file suit and before any restraining orders issued stopping internal disciplinary action against the claimant did not remove him from attending before the employer to defend himself.*

The Petitioner sought a myriad of remedies ranging from declaratory orders, reinstatement, compensation and payment of costs and interest thereof. However, having found that the Petitioner was the author of her own fate by failing to submit to the disciplinary proceedings, it therefore follows that the orders sought cannot be granted as they are pegged on the determination of the first issue of whether the termination of her employment was lawful, fair and for a justified reason.

In the case of **Patrick Nyongesa Makokha v Teachers Service Commission & Eldoret Polytechnic [Supra]** the Court also held that the summary dismissal of the claimant had good basis hence the claim for damages and compensation for breach of contract of unfair termination was lost. Thus, such remedies were not available to the claimant.

**In conclusion, the entire petition fails and is accordingly dismissed. Each party shall bear its own costs.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13<sup>TH</sup> DAY OF NOVEMBER 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**