



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 9 OF 2019

JANE NDENGI MUGAMBI.....CLAIMANT

VERSUS

THE COUNTY ASSEMBLY OF EMBU.....1ST RESPONDENT

THE CLERK, COUNTY ASSEMBLY OF EMBU.....2ND RESPONDENT

JUDGMENT

1. This Cause was initially filed at Nairobi as ELRC Cause No. 28 of 2019 and by orders made on 30th January 2019 by Abuodha J., the cause was transferred to this Honourable Court for hearing and disposal. Interim orders were also issued staying the Sectoral Committee Report pending further directions by this Honourable Court. By a Ruling on 16th October 2019 the Court declined to grant the interim orders sought. At all material times to this suit, the Claimant was the Chief Officer in charge of Gender, Children and Social Services in the County Government of Embu. The genesis of the suit was the 1st Respondent's Sectoral Committee on Gender, Culture, Children and Social Services titled **Report on Aborted Benchmarking Tour to Mombasa, Kwale and Kilifi Counties** dated 30th November 2018 which recommended, among others, that the Claimant step aside from her docket as Chief Officer in charge of Gender, Children and Social Services to give room for investigations into allegations of incompetence and violation of the Constitution and Public Officers Ethics Act, 2003. The Claimant averred that the Sectoral Committee Report was subsequently tabled and adopted by the 1st Respondent in its sitting on 5th December 2018. The Claimant averred that the Sectoral Committee Report was illegal, null and void for reasons that she was denied a right to fair trial in terms of Article 25(c) of the Constitution. The Claimant averred that the Sectoral Committee cannot purport to have conducted an investigation without considering her input as the officer whose conduct was under investigation. The Claimant averred that she has served the County Government of Embu as Chief Officer since 2016 which appointment was reconfirmed in December 2017. She averred that since her appointment she has executed her statutory responsibilities in the manner provided for by the law and ensured that public funds are applied prudently and efficiently for the people of Embu County per the Constitution, Public Finance Management Act, 2012 and the Embu County Finance Act, 2014. The Claimant averred that on or about 30th November 2018 the 1st Respondent's Sectoral Committee Report on Gender, Culture, Children and Social Services on 30th November 2018 prepared a report titled **Report on Aborted Benchmarking Tour to Mombasa, Kwale and Kilifi Counties** regarding her alleged misconduct and breach of the law and which report made various adverse recommendations against her. She averred that the Sectoral Committee's grounds justifying her removal lack merit and that the Sectoral Committee Report manifests vendetta, victimisation for actions done in the legitimate performance of the Claimant's duties as a public officer and is in breach of her labour rights under Article 41 of the Constitution and contravene her right to protection against victimisation and removal except by due process under Article 236 of the Constitution. The Claimant thus sought a declaration that the entire process, resolutions, and report by the Sectoral Committee on Gender, Culture, Children and Social Services dated 30th November 2018 and adopted by the County Assembly of Embu on 5th December 2018 is illegal, unconstitutional, null and void; orders restraining the removal of the Claimant from the office of Chief Officer in charge of Gender, Culture, Children and Social Services for Embu County; damages for unfair process; and costs of the cause.

2. The Respondents filed a defence in which it was averred that the Claimant's removal from office was in accordance with the law and that due process of law was followed in the process leading up to the recommendation to remove the Claimant from office. The Respondents averred that Standing Order No. 204(5) of the County Assembly of Embu which provides for the appointment of sectoral committees whose principal function and role includes *inter alia* investigate, inquire into and report on all matters relating to the subject matter assigned (mandate), management, activities, administration, operations and estimates of the assigned departments. The Respondents averred that the Sectoral Committee exercised its mandate as provided for in law and prepared a report on Aborted Bench Marking Tour to Mombasa, Kwale and Kilifi Counties. The Respondents averred that it was a finding that the Claimant steps aside as chief officer to allow investigations and further for an Ad Hoc Committee to be constituted as per Standing Order No. 206 to investigate the matter. The Respondents averred that on 5th December 2018 the report was tabled before the sitting of the 1st Respondent where the same was passed and adopted as a resolution. The Respondents averred that following the resolution of the County Assembly made on 5th December 2018, the 2nd Respondent wrote to the Chief Executive Officer County Public Service Board seeking implementation of the Resolutions within 60 days pursuant to Standing Order no. 195 of the County Assembly of Embu. The Respondents averred that the process of law was still running when the Claimant rushed to

file this suit. The Respondents averred that the Court has no jurisdiction to interfere with ongoing proceedings of the County Assembly especially since the County Assembly did not violate the Constitution. The Respondents averred that the proceedings of the County Assembly are privileged as provided for under Section 10 of the County Assemblies Powers and Privileges Act, 2017 as read with Article 196(3) of the Constitution of Kenya. The Respondents submitted that the claim seeks a review and consideration on merit of an ongoing proceeding of the County Assembly and this goes against the provisions of the law as this would greatly undermine the privilege and immunity which is clearly provided for in law. The Respondents averred that the Claimant had jumped the gun in filing the suit as the jurisdiction of the Court could not be invoked and that the suit lacked merit as the lawful procedures were being followed and investigations are still pending an ongoing proceeding of the County Assembly when the suit was filed. The Respondents prayed for the striking of the suit or dismissal with costs to the Respondents.

3. The matter was determined in terms of Rule 21 of the Employment and Labour Relations Court (Procedure) Rules 2016. The parties filed submissions in respect of their positions and the Claimant's submissions were to the effect that The Sectoral Committee Report arose from a planned benchmarking trip to Mombasa, Kwale and Kilifi Counties slated for 4th to 8th June 2018 where a myriad of allegations were levelled against the Claimant including that she publicly humiliated some members of the Gender, Culture, Children and Social Services Committee of the Embu County Assembly and abandoned them in Machakos County. The Claimant took issue with the sectoral committee report and submitted that the same was illegal, unconstitutional, null and void for the following reasons:-

a. The Sectoral Committee Report purports to have used verbal reports and oral interviews from affected persons (Clause 1.4) yet it never invited the Claimant to its sittings, considered her representations -oral or written- or gave her a hearing despite her alleged misconduct and breach of the law forming the primary and only basis of its inquiry.

b. The 1st Respondent's Committee in performing its roles pursuant to Section 8(1) of the County Governments Act, 2012 denied the Claimant the right to a fair trial and process despite the same being guaranteed under Article 25(c) of the Constitution. The Claimant despite the subject matter of the committee deliberations materially being about and/or affecting her was not accorded a chance to give her side of the story in breach of the tenets of natural justice.

c. The salient provisions of the Employment Act requiring that the Claimant be accorded a fair hearing prior to suspension from employment were not taken into consideration prior to the committee making adverse recommendations against the Claimant. The Claimant is a holder of a contract of employment with the County Government of Embu and entitled to all the rights and benefits accruing from such contract.

d. The Sectoral Committee ignored the express provisions of Standing Order 204(5) of the Embu County Assembly that require it to, among others, investigate, inquire into and report on all matters relating to the mandate, management, activities, administration and operations of the assigned departments.

e. The Sectoral Committee proceeded without due regard to the law thus rendering its proceedings contrary to the tenets of the Constitution, Employment Act, the 1st Respondent's Standing Orders and other applicable laws.

f. The Sectoral Committee erred in constituting itself as complainant, investigator, prosecutor, adjudicator and executor. The Select Committee was not independent because it was composed of the members of the Gender, Culture, Children and Social Services Committee, most of whom were complainants having formed part of the team that did not attend the proposed benchmarking trip. Accordingly, the Sectoral Committee was not an independent tribunal as envisaged in Article 50(1) of the Constitution.

The Claimant submitted that on the basis of the definition in Black's Law Dictionary 9th Edition, the Select Committee was not independent as independence means unbiased or disinterested. The Claimant submitted that to the extent that the Select Committee was comprised of members who were part of the abortive benchmarking trip, it failed the test of independence and impartiality. The Claimant submitted that she is not guilty of the misconduct and breach of the law attributed to her in the Sectoral Committee Report. The Claimant submitted that from the date of her appointment and during the subsistence of her term, executed her statutory responsibilities in the manner provided for by the law and ensured that public funds are applied prudently and efficiently for the benefit of the people of Embu County per the Constitution, Public Finance Management Act 2012 and Embu County Finance Act, 2014. The Claimant submitted that the grounds cited by the Sectoral Committee justifying its recommendations lack merit. She submitted that the Sectoral Committee report manifests vendetta, victimization for actions done in legitimate performance of her duties as a public officer and is breach of her right to fair labour practices under Article 41 of the Constitution. The Claimant submitted that the breaches and violations of the law by the Sectoral Committee render its Report illegal, null and void and the same cannot form the basis for removal of the Claimant from office.

4. The Claimant cited the case of **Commission for the Implementation of the Constitution v National Assembly of Kenya, Senate & 2 Others [2013] eKLR** where the Supreme Court opined the need for the system of checks and balances that prevents autocracy, restrains institutional excesses and prevents abuse of power. The Claimant submitted that separation of powers between the Judiciary, Executive and Legislature is one of the hallmarks of our Constitution and that each body or organ is bound by the Constitution and should at all times acquaint itself of its provisions as it works within its sphere of competence. She submitted that the Judiciary has the last word. The Claimant cited the case of **Martin Nyaga Wambora & The County Government of Embu v Speaker County Assembly of Embu & Others [2014] eKLR**, where the court gave orders restraining the Speaker of the Senate, from proceeding with any motion for the removal of the Governor. The Claimant submitted as to the question whether or not the court had jurisdiction to intervene on matters that intrude on the functions of other state organs, the court in its decision in the matter stated that under Article 165(3)(d), the court has jurisdiction to hear any matter relating to any question with respect to the interpretation of the Constitution including the determination of contravention of the Constitution and any other matter relating to the relationship between levels of government. The Claimant further cited the case of **Eng. Lucy Wanjiru Kariuki v County Assembly of Nakuru & Others; County Government of Nakuru (Interested Party) [2020] eKLR** where the court declared a nullity and unconstitutional proceedings to remove the petitioner from office on the grounds that the same was done in violation of the Constitution, the County Governments Act and the Assembly Standing Orders. The Claimant also cited the case of **Moses Kiprotich Langat v Kericho County Assembly Committee on Appointments & 3 Others [2018] eKLR** where the court held that the exercise of mandate by county assemblies must incorporate fairness and compliance with legal and procedural requirements. She urged

the grant of orders as prayed in her claim. The Respondents did not file submissions.

5. From the pleadings and the material adduced before me, the sole issue that arises for determination is whether there was breach of the Constitution and the subsidiary legislation in relation to the proceedings of the County Assembly of Embu when it proceeded to prepare and present a Sectoral Committee Report entitled **Report on Aborted Benchmarking Tour to Mombasa, Kwale and Kilifi Counties** dated 30th November 2018. There is no doubt that questions regarding the failure to abide a Constitutional provision is amenable to determination by superior courts. The system of checks and balances that is entrenched in the Constitution prevents autocracy, restrains institutional excesses and prevents abuse of power. In the case of **Eng. Lucy Wanjiru Kariuki v County Assembly of Nakuru & Others; County Government of Nakuru (Interested Party)** (*supra*) Mbaru J. held as follows:-

*The spirit and vision behind separation of powers is that there be checks and balances, and that no single person or institution should have a monopoly of all powers. This is aptly captured by the Supreme Court in **Re the Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011** where it expressed itself as follows:*

The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation.

*Therefore, when an issue arises as to the constitutionality of any act done or threatened by any person, entity or organ of government and the devolved unit such as the respondents, it falls upon the laps of the Judiciary to determine the same, As was held in **Jayne Mati & Another versus Attorney General and Another - Nairobi Petition No. 108 of 2011** at paragraph 31:*

...separation of powers between the judiciary, executive and legislature is one of the hallmarks of our Constitution. Each body or organ of state is bound by the Constitution and should at all times acquaint itself of its provisions as it works within its sphere of competence. Constitutional interpretation is not the sole preserve of the judiciary but the judiciary has the last word in the event of a dispute on the interpretation and application of the Constitution.

*In my view the issue for determination before this Court is the manner in which the 1st respondent's select committee and ultimately the 1st respondent carried out the process of removal of the petitioner. It is the petitioner's case that in conducting its proceedings, the committee violated the provisions of the law and the Constitution. Various constitutional provisions were relied upon by the petitioner in this regard. There is no doubt at all that in undertaking its mandate the 1st Respondent is under a constitutional obligation to comply with the law and the Constitution since in so doing, the 1st and 2nd Respondents are required to apply the Constitution and the law. Clearly therefore there can be no doubt that before the said process of removal of the petitioner herein had to comply with the constitutional principles. The attendant principles are well outlined in the case of **Trusted Society of Human Rights Alliance versus Attorney-General & 2 Others [2012] eKLR** relied upon by the parties herein. See also **Francis Maliti versus County Assembly of Machakos & 2 others; Governor, Machakos County (Interested Party) [2019] eKLR**.*

It is clear that a breach of the Constitution in the throes of such an investigation as was undertaken in this case would permit the Court to step in and determine the correctness and legality of the proceedings undertaken notwithstanding that there may be a resultant proceeding as a result of the initial one. It does not make any logical sense to allow a second investigation based on the illegal one undertaken previously to proceed to conclusion before a challenge is made to the propriety of the first inquiry or investigation. The breach where it occurs can be challenged at that point.

6. From the evidence adduced, a benchmarking tour was planned by the Claimant but the manner it was conducted left a sore taste in the County Assembly precipitating the *ad hoc* committee established by the County Assembly. The Report of the County Assembly Committee found that the Claimant was guilty of misconduct as she was alleged to have ignored the County Executive Committee member in charge of her docket regarding the benchmarking tour. She alleged to have also left members of the County Assembly stranded at Machakos in Machakos County after some deliberations and failed to stop when flagged along the Mombasa-Nairobi highway at the Machakos Junction. It is common ground that the Claimant was at the material time a Chief Officer in Embu County and she was accused of misconduct and breach of the law and there is evidence that there was deliberation of her alleged misconduct by the sectoral committee appointed by the County Assembly. The Sectoral Committee Report dated 30th November 2018 was subsequently tabled and adopted by the 1st Respondent in its sitting held on 5th December 2018 and following adoption of the Sectoral Report, the 2nd Respondent wrote to the County Secretary, Embu County Government seeking implementation of the report within 60 days pursuant to Standing Order 195 of the 1st Respondent's Standing Orders. The procedure for removal is clearly set out in the County Government's Act, 2012. Removal is contemplated to be among others, on the grounds of incompetence, gross misconduct, abuse of office, physical or mental incapacity, or gross violation of the Constitution or any written law. In my considered view, whereas misconduct was alleged which misconduct is sufficient grounds for removal, the Claimant was not granted the safe guards provided in law. There is no evidence that she was heard by the Sectoral Committee investigating the matter which is contrary to Articles 25 and 41 of the Constitution and Section 41 of the Employment Act. The Claimant was not subjected to due process and the resolution that she steps aside to allow for an investigation into allegations of incompetence and violation of the Constitution and Public Officers Ethics Act, 2003 was improper and outside the dictates of the law in the circumstances.

7. In the final analysis, the Claimant is entitled to the following relief:-

a. a declaration that the procedure and the entire process, resolutions, and report by the Sectoral Committee on Gender, Culture, Children and Social Services dated 30th November 2018 and adopted by the County Assembly of Embu on 5th December 2018 is illegal, unconstitutional, null and void to the extent the Claimant was not accorded a fair trial as she was not heard prior to the adverse findings against her.

b. The Claimant is also entitled to costs of the suit.

It is so ordered.

Dated and delivered at Nyeri this 3rd day of November 2020

Nzioki wa Makau

JUDGE