



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION 99 OF 2019

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 2, 3, 19, 20, 22, 23, 28, 35 (1) (2), 41 (1) (2) AND 47 OF THE CONSTITUTION

JAMES MARINGA MWANGI.....PETITIONER

VERSUS

KENYA MEDICAL RESEARCH INSTITUTE.....RESPONDENT

JUDGMENT

1. The Petitioner is the Respondent's employee serving as the Chief Internal Auditor and the Head of the Audit Department. On 17.10.2016, Ms. Elizabeth Irumbi Nyakaru was offered a vacancy in the Internal Audit Department as an Intern for 6 months. In March 2017, the intern verbally requested him to recommend for an extension of the internship but he declined because the policy did not permit such extension. On 10.4.2017, she made a formal application for the extension disregarding his verbal advice and the conditions stipulated in the contract she had signed that her term was six months' non-renewable ending on 17.4.2017. Eventually, the application was declined by the HR Department on 12.4.2017 and she left after the end of her contract period.
2. Sometime in July 2017, the petitioner received a call from Inspector Jane Sasi of Kilimani Police Station informing him that the Respondent's former intern, Elizabeth Irumbi Nyakaru had lodged a sexual assault/harassment case against him. He recorded a statement as requested, where he explained that the complaint was vindictive because her internship renewal request had been rejected and was also aimed at slowing him down from the various audit queries he had raised. Again in August 2017, the Petitioner received another call from Ms. Kerubo of Kilimani Police Station requiring him to record yet another statement regarding the same matter.
3. On 30.8.2017, he received summons signed on behalf of Dr. Kombe, the acting Director, directing him to appear before an internal *ad hoc* investigatory committee on 1/9/2017 to respond to the allegations of indecent assault lodged by the former intern. However, according to the petitioner, the Committee was the Respondent's creation to look into the sexual harassment complaint against him but it had no terms of reference and it was not provided for in the manuals. Subsequently, the Petitioner received frequent summons from the Committee's chair, Mr. Kamau Mugenda, without consensus on suitable dates. However, the meetings never materialized at the Committee's instance. The Petitioner avers that the Respondent is not keen on finalizing the complaint against him.
4. The petitioner averred that his request for information was denied by the Committee and its letter dated 27.2.2018 the committee informed him that the evidence sought could not be availed to him as the Committee's mandate was only to gather information. Subsequently, the matter was escalated to the Audit Committee but no action was taken.
5. Further, according to the petitioner, the Respondent has never communicated to him the criteria used in forming the *ad hoc* Committee and it was also never clear to him whether it was a fact-finding committee, investigation committee or an information gathering committee. Also according to him, the committee comprised staff members who were his juniors which amounted to an unfair labour practice, in light of the Committee's mandate. He also viewed the composition of the Committee as an attempt to humiliate him.
6. The petitioner contended that, on two occasions, he requested for information regarding the matter through his advocates but the requests were neither acknowledged nor elicited any response. Nevertheless, the Respondent shared a report with the Kilimani DCIO on 28.3.2018. According to the petitioner, the report has been kept as a secret from him yet the Respondent has shared it with strategic third parties.
7. The Petitioner avers that he was a victim of libelous article published by People's Daily on 25.1.2019 and Weekly Citizen on 28.1.2019 to 28.2.2019, a fact which he brought to the Respondent's attention but she never clarified to the media that the issue being reported was based on an inconclusive report. He further averred that the complaint was an afterthought coming after her application for internship renewal on 10.4.2017 was rejected. He contended that he escalated his predicament to the Commission on Administrative Justice (Ombudsman) who wrote a letter to the Respondent but the letter was never answered.
8. The Petitioner views the Respondent's actions outlined above as a breach of his rights under articles 28, 35 (1), 41 and 47 of the

Constitution and seeks the following reliefs in her petition filed on 17.6.2019–

- a. A declaration that the Respondent's failure to determine the official complaint lodged against the Petitioner on 16.5.2017 touching on an act allegedly committed on 20.3.2017 amounts to inordinate delay.
- b. A declaration that the Respondent's act of withholding information as requested by Petitioner is a breach of the Petitioner's rights under article 35 with regard to access to information.
- c. A declaration that the Respondent by subjecting the Petitioner to an *ad hoc* Committee constituted by his juniors is a breach of Article 41 of the constitution with regard to the Petitioner's right to fair labour practices.
- d. A declaration that the Petitioner's right to dignity as enshrined under article 28 has been violated on account of the sexual harassment complaint and the circumstances surrounding its handling.
- e. A declaration that the Respondent's behaviour of refusing to determine/pronounce itself on an official complaint against the Petitioner amounts to an unfair labour practice.
- f. An order of prohibition prohibiting the Respondent from taking any further action on the complaint registered in the year 2017 by Elizabeth Nyakaru Irumbi unless and until the criminal justice system has been exhausted.
- g. General damages.
- h. Any other relief this Court may deem fit.
- i. Costs be awarded to the Petitioner.

9. The Respondent opposed the Petition through the Replying Affidavit of Kamau Mugenda sworn on 13.12.2019. It was averred that on 16.5.2017, the Respondent's Chief Executive Officer received a sexual harassment complaint from the former intern and directed that the matter be investigated. Thereafter, the Respondent's acting Assistant Director, Human Resource, advised on the procedure to be followed where complaints of sexual harassment had been made through the internal memo of 23.5.2017. On 5.6.2017, second internal memo was issued recommending that formal investigations be conducted by a committee appointed by the Respondent's Director.

10. The Committee was constituted and the Petitioner was summoned to appear on 1.9.2017 and 26.2.2018. He was informed of the purpose of the meetings and the right to have a colleague present during the hearing. Ms. Elizabeth Irumbi was summoned to appear before the Committee on 1.9.2017 but appeared on 7.11.2017, due to her unavailability.

11. It was averred that Ms. Irumbi confirmed that she had been assaulted, sought medical treatment and was issued with a medical report. She also stated that she had reported the matter to Muthaiga police station and the Respondent's director and that the matter was being investigated.

12. The Respondent averred that at the meeting held on 26.2.2018, the Petitioner denied the allegations by Ms. Irumbi and contended that there was no evidence to prove the same. Thereafter, the Committee deliberated on the matter and observed that there was a contradiction in the Petitioner's recommendation letter of 11.4.2017 and his reprimand letter written after two days. As such, the Committee recommended that the matter be escalated to the next level.

13. The Respondent contended that the Committee's report was availed to the DCI, Kilimani Division in honour of the request letter received on 28.3.2018 and that the Respondent communicated that the report was confidential and inconclusive since the matter was still ongoing. It was contended that the Respondent was not responsible for the leaking of information regarding the matter to the press, as it had no control over how different individuals handled the matter in their private capacities.

14. The Respondent denied violating the Petitioner's right to access information and contended that he had most of the documents relating to the subject matter. The Respondent averred that Ms. Irumbi had written to the DCI's Complaint's office, the Director of Public Prosecutions, DCI Regional Coordinator and the Independent Oversight Authority, complaining about the delay in concluding the matter.

15. The Respondent contended that the *ad hoc* Committee was instituted to collate information and make recommendation to the Respondent's Director General. According to the respondent, the committee was chaired by Mr. Kamau Mugenda, who was then the respondent's Deputy Director Administration and Finance and the designate Director for Corporate Services and the committee was guided by the respondent's Policy.

16. The Respondent averred that the DCI and the Police were carrying out parallel investigation to which the Director General and the Deputy Director, Administration and Finance, were summoned to record their statements. The Respondent contended that it had no control over how other investigative agencies undertake their investigations on the matter.

17. The Respondent was of the position that the Petitioner ought to have exhausted the alternative remedies available under the Access to Information Act before filing this Petition hence the same is premature and vexatious. She contended that the letters from the Ombudsman were received after filing of this suit. In light of all the foregoing matters, the Respondent urged that the prayers sought by the Petitioner were unmerited.

18. The Petitioner filed a rejoinder vide his Further Affidavit sworn on 14.2.2019 in which he reiterated the averments made in the petition and the supporting affidavit. He further stated that the Respondent shared information that was limited to HR without consulting him and thereby breached its obligations. In his view the investigations being carried out by the DCI were irrelevant to this case as the matter before this Court pertained to how the Respondent handled his case. Finally, he contended that the Respondent concealed the fact that the Board of Management through the CEO decided to close the case after it emerged that the Committee chaired by Kamau Mugenda did not have sufficient evidence.

19. The Petition was disposed of by way of written submissions.

The Petitioner's Submissions

20. The Petitioner submitted that the Respondent's failure to determine the matter timeously and confidentially breached the provisions of clause 5.3.3 of the Respondent's manual which required that complaints or reports of sexual harassment be treated promptly, seriously and in confidence. This is evidenced by the fact that information was leaked to the media and that the Respondent concluded the matter in 2019 without giving an explanation for the delay.

21. He relied on the case of **Michael Meegesh Sangiriaki vs. Narok County Government [2014] eKLR** where the Court found that the inordinate delay without any explanations for the delay amounted to an unfair labour practice. In the court's view, fair labour practice comprised of expeditious investigations into allegations of an employee's misconduct.

22. The Petitioner submitted that by subjecting him to an *ad hoc* committee that constituted of his juniors, the Respondent breached his right to fair labour practices. He submitted that the Respondent had not contended the said assertion or adduced evidence to controvert that of Petitioner.

23. The Petitioner submitted that his right to human dignity was violated. This because, for two years he suffered the indignity of having sexual harassment allegations hanging over him, which was later dropped for lack of merit. He relied on the case of **JWN vs. Securex Agencies (K) Limited [2018] eKLR** to support his position. He also submitted that the Respondent's adamance to entertain the matter until the justice system was exhausted reeks of bad faith, in light of queer circumstances that prompted Ms. Irumbi to lodge a complaint.

24. The Petitioner abandoned the prayer for the issuance of prohibition orders because the Respondent closed his case. The Petitioner submitted that he had established a case to warrant an award for damages having proved that his rights were violated. He urged this Court to condemn the Respondent to costs in the event the Petition is allowed.

The Respondent's Submissions

25. The Respondent submitted that there was no delay in the manner in which the complaint was handled. It contended that the steps it took would have been undertaken by any reasonable entity or employer bearing in mind the circumstances of this case as illustrated in other parts of this judgment. She relied on the case of **Utalii Transport Company Limited & 3 Others vs. NIC Bank Limited & Another [2014] eKLR** where the Court held that what amounts to inordinate delay differs from case to case depending on the circumstances, subject matter and explanation given.

26. The Respondent contended that she handed over the report of the *ad hoc* Committee to the DCI but clarified that the report was not conclusive as the matter was still going through the internal processes.

27. The Respondent submitted that it did not infringe on the Petitioner's right to access information as the report was availed vide the Replying Affidavit of Kamau Mugenda. Further, that information the Petitioner sought was within his knowledge as evidenced in the documentation annexed to his affidavits.

28. The Respondent also contended that the Petitioner did not exhaust the alternative remedies as required by section 22 of the Access to Information Act that required him to lodge a complaint with the Commission on Administrative Justice and only file a suit in the High Court if he is aggrieved with the Commission's order. As such, this suit was premature.

29. The Respondent submitted that the appointment of the *ad hoc* Committee and the circumstances surrounding its appointment did not violate the Petitioner's rights. It is contended that the Petitioner failed to demonstrate how the membership of the Committee prejudiced his rights thus denying the Respondent the opportunity to appropriately respond to the allegation. It was also her position that the *ad hoc* Committee was established for purposes of inquiring into the allegations made by the Ms. Irumbi and not to undertake disciplinary proceedings.

30. She relied on the case of **Kenya Plantation & Agricultural Workers Union vs. Unilever Tea Kenya Limited [2017] eKLR** where it was held that an employer had a duty to prevent and punish sexual harassment and must adopt all the necessary measures to guarantee a safe working condition.

31. The Respondent submitted that the Respondent's policy statement granted the Director the discretion to decide on the appropriate action to be undertaken. As such, the *ad hoc* Committee was constituted in compliance with the policy and that the matter was handled in a very professional manner expected of any employer. She also submitted that her actions did not breach the provisions of the law and that the Petitioner had failed to adduce evidence to demonstrate the alleged breach.

32. It was the Respondent's submissions that the Petitioner failed to demonstrate the manner in which his right to human dignity was violated and relied on the case of **Judicial Service Commission vs. Gladys Boss Shollei [2014] eKLR** and the cases of **Anarita Karimi Njeru vs.**

33. The Respondent submitted that the prohibition orders had been overtaken by events as the Petitioner's case was finalized. The Respondent urged this Court to find that the claim for an award of damages was unmerited as the Petitioner has failed to prove his allegations as per the set standard.

Issues for determination and analysis

34. Having carefully considered the petition, the affidavits and submissions by both parties, it is not in contention that the Respondent delayed finalization the Petitioner's case of alleged sexual harassment for about 2 years after it was lodged by a former intern forcing him to lodge a complaint with the Ombudsman and thereafter filed the instant petition. It is also common ground that an *ad hoc* Committee was formed to investigate and advise the respondent's CEO on the said allegations. It is also a fact that the Petitioner was the subject of libelous matter emanating from the investigations into the allegations of sexual harassment. The issues for determination are—

- a. Whether the Petition has met the competence threshold for a Constitutional Petition.
- b. Whether the Respondent violated the Petitioner's rights.
- c. Whether the Petitioner is entitled to the reliefs sought.

Whether the petition has met the competence threshold.

35. The threshold to be met by a constitutional petition was set out in the case of *Anarita Karimi Njeru vs. Republic* [Supra] 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 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.

36. What amounts to precision was expounded on by the Court in *Trusted Society of Human Rights Alliance vs. AG & 2 Others* [2012] eKLR whose decision on the issue of precision of constitutional petitions was upheld by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, where it was observed as that: –

“46. We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.

37. In the instant petition it is clear that the Petitioner is challenging the Respondent's actions which, in his view, violated his right to fair labour practice, human dignity and fair administrative action. The Petitioner has outlined in detail, the facts that forms his case. He has also pointed out which of the Respondent's actions violated his rights and the manner in which the actions amounted to a violation. Consequently, it is my considered view that the instant Petition has met the competence threshold outlined above.

Whether the respondent violated the petitioner's constitutional rights.

38. The foundation of the Petitioner's case is not pegged on the occurrences that led to the institution of disciplinary proceedings against him or the constitution *ad hoc* Committee, rather, it focuses on the manner in which the matter was handled. As such, this Court will not delve into the merits of the complaint.

39. The Petitioner submitted that his right to fair labour practice was infringed upon due to the Respondent's delay in concluding the matter. On the other hand, the Respondent submitted that the matter was handled timeously considering the circumstances surrounding the case.

40. On 30.8.2017, the Petitioner received summons directing him to appear before an investigatory committee on 1.9.2017 to respond to the allegations of indecent sexual assault lodged by Ms. Irumbi. This was the beginning of what the Petitioner terms, a long wait, in concluding the matter.

41. The Petitioner was invited to appear before the Committee on numerous occasions but the meetings never proceeded with no explanation as to the reason why. For instance, the Petitioner wrote the internal memo of 12.1.2018 to Dr. Yeri Kombe, Ag. Director, inquiring on why the day's meeting had not been held and why nothing had been communicated to him.

42. The Petitioner's complaints did not stop there. Aggrieved by the Respondent's delay in concluding the matter, the Petitioner made a complaint to the Office of the Ombudsman. Acting upon the complaint, the Office of the Ombudsman wrote to the Respondent's Chairperson to the Board of Management, the letter dated 22.1.2019 outlining the Petitioner's complaints which are quoted verbatim as

follows–

- a. *That he is an employee of KEMRI serving as the Chief Internal Auditor.*
- b. *That in month of July 2017, he was accused of indecent sexual assault against Ms. Elizabeth Irumbi Nyakaru.*
- c. *That the matter was taken up by the Director, KEMRI who appointed an ad hoc Committee to investigate the allegations.*
- d. *That the Committee delayed in resolving the matter prompting him to report the delay to the Board Audit Committee vide his letter of 15th March 2018.*
- e. *The matter was discussed in the Board of Management meeting on 16th July 2018 wherein the Board constituted an ad hoc Committee to investigate the matter and report in two months.*
- f. *That the two months lapsed in mid-September 2018, yet he has never been informed of the outcome of the matter.*
- g. *That vide the letter dated 28th March 2018, the Directorate of Criminal Investigations wrote to KEMRI requesting the outcome of its investigations to enable them conclude the criminal case of sexual assault reported to Kilimani Police Station by the same complainant.*
- h. *That he feels aggrieved since the allegations are grievous in nature, have resulted in the assassination of his character and almost two years after they were raised no substantive action has been taken to bring the same to a closure.*
- i. *That he seeks to have the matter brought to a closure and the outcome thereof communicated to him.*

43. This brief history of the matter is important as it gives one an appreciation of the Petitioner's frustrations with the pace at which the matter was handled by the employer. No reasonable explanation was given to justify the delay. A delay of two years without concluding such serious allegations against the petitioner was not only stressful and unfair but also unreasonable. In my view, it was immaterial that the DCI was also slow in concluding police investigations because it is now trite law that internal disciplinary proceedings are not bound by the outcome of the criminal proceedings (See **Attorney General & Another vs. Andrew Maina Githinji & Another [2016] eKLR**).

44. Accordingly, it is my considered view that the Respondent's failure to handle the complaint expeditiously infringed upon the Petitioner's right to fair labour practice. I am guided by the case of **Michael Meegesh Sangiriaki vs. Narok County Government [2014] eKLR** where it was observed:

“32. In view of the Court, there has been inordinate delay, and without any explanations for the delay by the respondent, the petitioner's right to fair labour practices was violated. The petitioner has been or stands to be prejudiced by the failure by the respondent to carry out investigations, memories fade and the petitioner may not competently defend himself.

33. fair labour practice although not defined in Kenya would include expeditious investigation of allegations of misconduct in employment by an employer.

34. in the case of A v B (2003) IRLR 405, it was held that a delay in the conduct of investigations might itself render the dismissal process unfair.”

45. Having made a finding that the delay of two years was unreasonable and without explanation, I wish to hold that such delay also violated the petitioner's right to fair administrative action as envisaged under Article 47 of the Constitution and amplified under section 4 of the Fair Administrative Action Act. In this case the petitioner was cleared of the alleged misconduct by the respondent's Board of Management after the instant petition was filed. Had this verdict come sooner, the Petitioner would have been saved a lot of stress and humiliation.

46. In **Joseph Mbalu Mutava v Attorney General & another [2014] eKLR** the Court of Appeal expressed itself as follows concerning delayed proceedings:

“The requirement for expeditious hearing in Article 47 of the Constitution must of necessity be read together with the requirement of efficiency in the conduct of administrative function, as one of the key reasons for quick and timely administrative actions is to ensure that no undue prejudice is suffered by any person affected by the said actions. In determining whether an action is expeditious, the context and circumstances in which such action is being undertaken is therefore relevant both in evaluating whether in the circumstances the action was timeous, and also in light of the any adverse effects on the person affected by the decision. Factors to be taken into account in determining the level of expeditiousness will include the type and complexity of the action being undertaken, and the conduct and diligence of all the parties involved.”

47. As regards the respondent's failure to issue the Petitioner with the report of the *ad hoc* Committee, I am satisfied that the said failure amounted to denial of information and therefore a violation of his right under article 35 of the Constitution. The respondent did not give any

justification for withholding the information from the petitioner yet she gave the report to third parties. The report contained information that adversely affected him having recommended that the matter be escalated to the next level for considerations and deliberations. The report was also forwarded to the DCI for possible criminal prosecution.

48. Again, the Respondent's position that the Petitioner never followed the procedure set out under section 14 of the Access to Information Act and only did so after filing this suit is incorrect. The suit was filed on 17.6.2019 whereas the Commission was in communication with the Respondent as early as 22.1.2019.

49. The Petitioner also claimed violation of his right to fair labour practices from the fact that the Respondent constituted an *ad hoc* Committee which had no anchorage in law or her manuals. The same was complained of by the Petitioner in his letters to the Respondent, his Advocates' letters to the Respondent and in his complaint to the office of the Ombudsman.

50. Though the Respondent provided no justification for composing an *ad hoc* Committee, the Petitioner failed to provide this Court with evidence of what amounted to a properly constituted Committee. It was not enough to allege that the constitution was improper and humiliating to him. In the absence of evidence to justify the allegations that the *ad hoc* Committee was improperly constituted, it is my considered view that the same remained mere allegations.

Whether the petitioner is entitled to the reliefs sought

51. In view of the finding that the failure to conclude the sexual harassment case against the petition for 2 years was without justification, I now make a declaration that the said default amounts to inordinate delay. I further make declaration that the said inordinate delay violated the petitioner's right to fair labour practice and right to fair administrative action contrary to Article 41 and 47 of the Constitution.

52. As regards the failure to provide the petitioner with the investigations report, I make a declaration that the Respondent's act of withholding information as requested by Petitioner is a breach of the Petitioner's rights under article 35 with regard to access to information.

53. The prayer to prohibit the Respondent from taking any further action on the complaint registered in the year 2017 by Elizabeth Irumbi Nyakaru is declined because it is now common ground that the complaint has since been dismissed by the respondent's Board.

54. In light of the circumstances and holding outlined hereinabove, it is my considered view that the Petitioner has proved a case for an award of damages. Article 23 of the Constitution grants this Court the power to grant an order for compensation where an individual alleges a violation of their rights. Further, section 12 (3) (vi) of the Employment and Labour Relations Court bestows upon this Court the power to grant an award for damages in any circumstances contemplated under the Act or any written law. Considering the emotional stress and humiliation that the petitioner had to bear for over two years, I am of the view that an award of KShs. 1000,000.00 as general damages for violation of the petitioner's constitutional rights set out above is reasonable.

55. The Respondent will bear the costs of this suit.

Dated and delivered at Nairobi this 17th December, 2020.

ONESMUS N MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE