



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**ELRC PETITION NO. 141 OF 2016**

(Before Hon. Justice Hellen S. Wasilwa on 14<sup>th</sup> March, 2019)

**MAJ (RTD) ISAAC MATI ONDARI.....PETITIONER**

**-VERSUS-**

**KENYA PIPELINE COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Petitioner instituted suit vide the instant Petition dated 14<sup>th</sup> November, 2016, seeking for the following reliefs:

**a. A declaration that the acts and letters of the Respondent complained of above are and were unlawful and infringed upon the Petitioner's rights and fundamental freedoms and are null and void ab initio.**

**b. An order of certiorari to bring to this Honourable Court to quash the decision of the Respondent contained in the letters dated the 4<sup>th</sup> May, 2016, 4<sup>th</sup> August 2016 and 6<sup>th</sup> July, 2016.**

**c. Upon grant of prayer b) above the Honourable Court does issue an order directing that the Respondent do unconditionally reinstate the Claimant to his employment services and former position with the Respondent without any loss of benefits.**

**d. An order of prohibition directed at the Respondent, its employee's agent's representatives and or otherwise howsoever restraining them from taking or continuing any action against the Petitioner based on the unlawful illegal and unknown and opaque generalised allegations against the Petitioner.**

**e. A permanent injunction restraining the Respondent acting by itself, agents, employees, servants or through any other person from publishing, causing to be published causing to be printed causing to be broadcast or in any way facilitating any such publication through any medium within and without Kenya.**

**f. A permanent injunction restraining the Respondent acting by itself, agents, employees, servants or through any other person from evicting and conducting itself in a manner that would prejudice the Petitioner's occupation of the Respondent's Company house number 63 at Embakasi staff quarters during the subsistence of the Petitioner's employment.**

**g. A declaration that the purported staff disciplinary committee as presently constituted when the purported personal hearing took place cannot afford and guarantee fair hearing rights of the Petitioner.**

**h. A declaration that the Respondents Staff Disciplinary Committee as was constituted to purportedly hear the Petitioner was and still is illegal and lacked the jurisdiction to hear the Petitioner.**

**i. Compensation for unlawful and wrongful suspension.**

**j. Aggravated or Punitive damages harm to reputation, hurt feelings and damage to self-esteem and emotional well-being in view of the fact that he Respondent's actions are particularly egregious.**

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

**l. Costs of the Petition.**

## **Facts**

2. The Petitioner avers that he was engaged by the Respondent on 2<sup>nd</sup> June, 2009 in the position of Senior Security Officer, Job Group 4 in its Security Department. That he performed his duties with utmost diligence, commitment, responsibility, industry and reverence in accordance with the specifications of his employment.
3. That for the 7 years he had worked for the Respondent he had never received any warning but instead earned a letter of recommendation for upholding high standards of integrity by declining to take a bribe while deployed by the Respondent as Senior Security Officer.
4. He contends that in recent years he suffered malice, hatred and vendetta at the instance of the Respondent and its officers who have forcefully subjected him to ill-informed transfers without lawful justification.
5. That as a trained Pilot he had on various occasions requested to be seconded to the air wing but the Respondent out of ill will and in frustration of the Petitioner's career development has declined to grant the said requests.
6. The Petitioner avers that in March, 2016, while on duty at the Respondent's Changamwe Station, he learnt of a Cartel involved in the theft of petroleum products which he reported to the Respondent's management. Subsequently he was summoned by the Respondent to its headquarters for briefing on the said report before the Acting Managing Director, Finance Manager, the Human Resources Manager, Security Manager, Chief Security Officer and the Senior Security Officer – Investigations where a resolution was reached that a team consisting of the Petitioner, the Chief Security Officer and the Senior Security Officer to carry out some investigations.
7. That his other team members did not participate at all in the investigations placing the responsibility of conducting the investigations on the Petitioner's shoulders despite the fact that the task was extremely dangerous as Senior Police Officers were involved.
8. He avers that on 4th May, 2016, he received a letter from the Respondent signed by the Human Resource Manager, Mr. T.M. Ngira on behalf of the Managing Director sending him on suspension on allegations of involvement in contributing to the provision of leakage of KPC's information on tenders for supply of materials and information on other projects to external parties in an unauthorised manner. That the suspension was for a period of 6 months on half salary and in his case, the suspension went beyond the said 6 months contrary to the Staff Rules and Regulations.
9. According to the Petitioner, the Suspension was illegal and without justifiable cause, and in utter breach of the Respondent's Staff Rules and Regulations. The Petitioner avers that he lodged a complaint with the office of the Ombudsman who wrote a concern to the Respondent about the Petitioner's complaint but that the Respondent never responded.
10. On 11<sup>th</sup> July, 2016, he received a Notice to show cause dated 6<sup>th</sup> July, 2016 giving him 48 hours to respond to the charges contained therein. On 4<sup>th</sup> August, 2016, he was invited for a hearing which was to take place on 9<sup>th</sup> August, 2016. He attended the said hearing with his colleague one Mr. Francis Mwendwa Titus but the Respondent denied him such company. At the hearing he avers that he was not accorded an opportunity to be heard as the Respondent failed to supply him with his accuser's statements, evidence they intended to rely on and the investigation report in order that he would respond appropriately and controvert the same despite requesting to be supplied with the same.
11. The Petitioner avers that the Respondent's actions have infringed on his rights to freedom and security as goons were hired to frustrate him and his family members living within the Respondent's staff quarters in Embakasi who were accosted in the wee hours of the night.
12. That on 1<sup>st</sup> September, 2016, the Respondent maliciously demanded return of the Company laptop and Tablet for safe custody four months after the illegal suspension from duty. He made a request to be paid per diem to travel to Nairobi to hand over the laptop as directed but the Respondent declined to do so.
13. The Petitioner avers that he is entitled to due process that is consistent with the rules of natural justice, compliant with the Staff Rules and Regulations, the Mwongozo Code, the Employment Act and the Constitution of Kenya 2010.
14. That the Petitioner's rights under Article 47 of the Constitution were breached as follows:-
  - a. Failing to accord the Petitioner a hearing before suspending him.**
  - b. Applying an illegal disciplinary procedure on the Petitioner by sending the Petitioner on suspension with half salary is flagrant breach of the Respondent's Staff Rules and Regulations.**
  - c. Failure to accord the Petitioner an opportunity to be heard by an independent Disciplinary Committee and to make representation in that regard.**
  - d. Failure to accord the Petitioner a right to legal representation or even notice of that right.**
  - e. Failure to accord the Petitioner an opportunity or right to cross-examine persons who gave adverse evidence against the Petitioner.**
  - f. Failure to give the Petitioner an opportunity or right to cross-examine persons who gave adverse evidence against the Petitioner.**

- g. Failure to provide the Petitioner with the Investigation Report and any other material to be used against the Petitioner.**
- h. Failure to constitute an impartial and proper Disciplinary Committee.**
- i. Failure to accord the Petitioner adequate time to prepare for the hearing before the disciplinary committee.**
- j. Subjecting the Petitioner to arbitrary, malicious and unfair process tinged with vendetta.**
- k. Failure to subject the Petitioner to the staff disciplinary procedures as set out under the Human Resource Manual of the Respondent.**
- l. Subjecting the Petitioner to a purported disciplinary process that is procedurally unfair and unreasonable.**
- m. Subjecting the Petitioner to an unlawful process.**
- n. Generally, breaching the Petitioner's right to natural justice i.e. the right to be heard.**

15. Further to the above that the Petitioner's rights under Article 10, 24, 27, 28, 35, 50 and 73 of the Constitution of Kenya, 2010, were infringed.

16. The Petitioner prays for:-

- a. A declaration that the acts and letters of the Respondent complained of above are and were unlawful and infringed upon the Petitioner's rights and fundamental freedoms and are null and void ab initio.**
- b. An order of certiorari to bring to this Honourable Court to quash the decision of the Respondent contained in the letters dated 4<sup>th</sup> May, 2016, 4<sup>th</sup> August 2016, and 6<sup>th</sup> July 2016.**
- c. Upon grant of prayer b) above the Honourable Court, do issue an Order directing that the Respondent do unconditionally reinstate the Claimant to his employment services and former position with the Respondent without any loss of benefits.**
- d. An order of prohibition directed at the Respondent's, its employees, agents representatives and or otherwise howsoever restraining them from taking or continuing any action against the Petitioner based on the unlawful illegal and unknown and opaque generalised allegations against the Petitioner.**
- e. A permanent injunction restraining the Respondent acting by itself, agents, employees, servants or through any other person from publishing, causing to be published, causing to be printed, causing to be broadcast or in any way facilitating any such publication through any medium within and without any medium within and without Kenya.**
- f. A permanent injunction restraining the Respondent acting by itself, agents, employees, servants or through any other person from evicting and conducting itself in a manner that would prejudice the Petitioner's occupation of the Respondent's Company house number 63 at Embaksai staff quarters during the subsistence of the Petitioner's employment.**
- g. A declaration that the purported staff disciplinary committee as presently constituted when the purported personal hearing took place cannot afford and guarantee fair hearing rights of the Petitioner.**
- h. A declaration that the purported staff disciplinary committee as presently constituted when the purported personal hearing took place cannot afford and guarantee fair hearing rights of the Petitioner.**
- i. Compensation for unlawful and wrongful suspension.**
- j. Aggravated or Punitive damages harm to reputation, hurt feelings and damage to self-esteem and emotional well-being in view of the fact that the Respondent's actions are particularly egregious.**
- k. The Honourable Court do issue any Orders and give such directions as it may deem fit to meet the ends of justice.**
- l. Costs of the Petition.**

17. The Respondent filed a Replying Affidavit in opposition of the Petition sworn by one Joe Sang, the Managing Director of the Respondent. He avers that one of the terms and conditions regulating the Petitioner's employment as set out in the letter of employment dated 12<sup>th</sup> May, 2009, is that the Petitioner could be deployed to any station within the Respondent to discharge his duties and as such any decision to transfer to him was not ill informed as alleged by the Petitioner.

18. That following investigations conducted by the Respondent on some negative appearance in both print and social media on the Respondent tenders for supply of materials and information on other projects it was revealed that it emanated from the Petitioner. The Petitioner was informed of the said investigations and that the same had implicated him. He was informed that in line with Clause 8.3.4 of the Respondent's Staff Rules and Regulations, 2015, the Respondent decided to suspend the Petitioner from duty with immediate effect.

19. That during the period of suspension, the Petitioner received his half salary and full benefits. That the Claimant was notified vide a letter dated 6<sup>th</sup> July, 2016, that the acts stated above amounted to gross misconduct and he was requested to give a written response. By a letter of 4<sup>th</sup> August, 2016, the Respondent invited the Petitioner to attend the Respondent for a hearing before the Staff Disciplinary Committee wherein he was invited to defend himself against the allegations.

20. That the Petitioner had not requested for any documents prior to the hearing neither did he make a request before the Committee for any document. The Petitioner did not seek an adjournment to enable him prepare any further response on the allegations. They deny that any person accompanied the Petitioner to the hearing contrary to what is alleged in the Petition.

21. He avers that the Petitioner was accorded an opportunity to be heard and was granted ample time to defend himself. That after taking the Petitioner's representations the Respondent found the same unsatisfactory and resolved that the Petitioner would be summarily dismissed with effect from 11<sup>th</sup> November, 2016. The said letter was served on the Petitioner at his resident at the Respondent's staff quarters on the same day but he was not present in his house and his family members refused to accept service on his behalf. The said letter was posted to him through his last known address on 14<sup>th</sup> November, 2016.

22. That the decision to terminate was made in accordance with Section 44(4) (c) and (e) of the Employment Act and Clause 8.5.5 of the Respondent's Staff Rules and Regulations, 2015. They aver that by the time of filing this Petition, the Petitioner had already been terminated and therefore some of the orders sought were already spent.

23. That the employment of persons in various positions at the respondent is a prerogative of the Respondent. The Respondent has not advertised for the position of helicopter pilot hence the prayer for an order that the Petitioner be deployed as a helicopter pilot is misplaced. The Respondent deny attacking or causing to be attacked the Petitioner and his family and any allegation to the contrary is unfounded. That the Petition be dismissed with costs.

### **Petitioner's Submissions**

24. It is submitted on behalf of the Petitioner the summary dismissal was neither fair nor was it lawful. That the termination letter failed to specify the charge together with detailed particulars levied against the Petitioner contrary to Section 41 of the Employment Act. The reasons for termination were not provided at all.

25. That Section 41(1) of the Employment Act No 11 of 2007 provides:-

**"subject to Section 42(1), an employer shall before termination 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 reasons 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."**

26. That the Respondent did not explain to the Petitioner the reason for the termination and neither did they allow the attendance of his co-employee at the alleged disciplinary hearing and thus the termination was grossly unfair.

27. They cite the case of **Mary Chemweno Kiptui -v- Kenya pipeline company limited [2014] eKLR** where Justice Monica Mbaru held:-

**"Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow those mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of a fellow employee of their own choice. The situation is dire where such an employee is terminated after such a flawed process without a hearing, as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defense followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets".**

28. That the Respondent failed to comply with Section 43 of the Employment Act as they failed to prove the reasons for termination of the employment of the Petitioner. For the aforesaid reasons the Claimant urges the Court to allow the Claim in its entirety.

### **Respondent's submissions**

29. The Respondents failed to file their submissions as directed by Court but put in late submissions on 12/3/2019.

30. I have examined all the evidence and submissions as filed. The issues for determination are as follows:-

- 1. Whether there were valid reasons to dismiss the Petitioner.**
- 2. Whether the Petitioner was given a fair hearing.**
- 3. Whether the Petitioner is entitled to remedies sought.**

31. On the 1<sup>st</sup> issue, the Petitioner was suspended from duty vide a letter dated 4.5.2016 (Appendix IMO3). The reason given for the suspension was the alleged contribution by the Petitioner to the negative appearance both in the print and social media of KPC's information on tenders for the supply of materials and information on other projects.

32. 2 days later on 6.5.2015, the Petitioner was transferred to Mombasa while on suspension. This transfer was considered following an earlier appeal by the Petitioner after being transferred to Eldoret in April 2014.

33. In April, 2016 the Petitioner had carried out some investigations report on Changamwe Product theft in 2015 which report is annexed as Appendix IMO7.

34. Following the suspension of the Petitioner, he was served with a show cause letter on 6.7.2016 asking him to explain himself on leaked information linked to him. He was asked to respond within 48 hours.

35. The Petitioner sought extension of the period of response to 7 days citing the reasons that he did not have access to company facilities to enable him respond effectively. He finally responded to the show cause letter vide a letter dated 13.7.2016 denying the allegations levelled against him.

36. On 4.8.2016, the Petitioner was invited for a disciplinary hearing. From the minutes of the disciplinary hearing held supplied by the Respondent as Appendix JS7 the Committee observed as follows:-

**“....He was accused of having prior information, which information as a Security Officer, he ought to have formally reported it. From available information by his own admission, there is evidence to the effect that he had this information and was discussing it when it had already been “blogged”. It is likely that he knew of the information before it was blogged” (emphasis is mine)”.**

37. The accusation against the Petitioner was that he leaked information to a blogger, which he denied. In the disciplinary hearing however, the issue is he had prior information about the matters discussed by the blogger.

38. The accusations levelled against the Petitioner were that he leaked information to external parties and particularly to a blogger by the name of Cyprian Nyakundi who published in his blog on 13<sup>th</sup> March 2016.

39. The Committee findings however relate to having prior information to the information. There is no evidence of the leaking of the alleged information and the committee concludes that he likely knew of the information before it was blogged.

40. No evidence was submitted before Court of the leaking of the information by the Petitioner to the said Nyakundi. The Committee based their findings on what they thought was the most likely scenario without explaining why they reached their findings.

41. This is a proper case where the Petitioner was facing particular charges but was “found guilty” on a different set of charges that were not before him.

42. The findings of the Committee were based on mere suspicions as no tangible evidence was presented to Court or before the Committee of how the Petitioner transmitted information to the alleged blogger.

43. Section 43 of the Employment Act states 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.**

**2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.**

44. In view of the fact that there is no tangible evidence that the Petitioner leaked information to a blogger, there were no valid reasons to terminate the services of the Petitioner as alleged by the Respondent.

45. On the second issue, the Petitioner has averred that he was not subjected to a fair disciplinary process.

46. The unfairness, he avers was due to the fact that his witness was not allowed to give evidence and that the Staff Disciplinary Committee was not properly constituted.

47. The Petitioner was on Job Group 2.4 and under Clause 8.4 (iii) the disciplinary committee to hear his case was made up of the Managing Director with Heads of Division. Heads of Divisions were General Managers.

48. From the minutes of the disciplinary committee submitted by the Respondent, the Panel included Mr. Tom Mailu – (Corp Planning Manager) chairing and Human Resource Manager, ICT Manager, Security Manager, Ag Ops Manager and Ms. Safia Jama (Ag CHRO-s).

49. Definitely then, the Managing Director was missing in this panel and the Secretary was a Chief Human Resource Officer. The committee was therefore improperly constituted.

50. The Petitioner was therefore not accorded a proper administrative action as envisaged under Article 47 of the Constitution.

51. Under Section 7(2) (a)(i) of the Fair Administrative Action Act which states as follows:-

**2. A court or tribunal under subsection (1) may review an administrative action or decision, if:-**

**a. the person who made the decision:-**

**i. was not authorized to do so by the empowering provision;**

52. An improperly constituted panel renders an administrative action improper and makes the entire process annulity.

53. Given that the Petitioner was terminated without valid reasons and without a proper disciplinary hearing, I find his termination unfair and unjustified under Section 45(1) of Employment Act which states 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”.**

54. In terms of remedies, I find the only relevant and apt remedy for the Petitioner is a reinstatement to his previous position without loss of salaries and allowances with immediate effect till time of proper retirement or unless dismissed for any other valid reasons.

55. The Respondent will also pay costs of this Petition and interest at Court rates with effect from the date of this judgement.

**Dated and delivered in open Court this 14<sup>th</sup> day of March, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Okoth for Petitioner – Present

No appearance for Respondent