



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

PETITION NO. 01 OF 2018

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010, ARTICLE NOS. 2(1) 3(1), 10,19,20,21,27 (1), 47, 50 (1), 162 (2),
236 , 260 AND 176 OF THE CONSTITUTION 2010**

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT 2015

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT 2012

AND

IN THE MATTER OF EMPLOYMENT ACT 2007

AND

IN THE MATTER OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT 2014

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTION OF KENYA 2010 THE FAIR
ADMINISTRATIVE ACTIONS ACT 2015, THE EMPLOYMENT ACT 2007 AND OTHER PROVISIONS OF THE LAW**

BETWEEN

BISHOP WAFULA MUKHWANA.....PEITIONER

AND

COUNTY GOVERNMENT OF TRANS-NZOIA.....1ST RESPONDENT

THE COUNTY PUBLIC SERVICE BAORD,

TRANS-NZOIA COUNTY.....2ND RESPONDENT

J U D G M E N T

The Petitioner was retired by the 2nd Respondent in public interest by a letter dated 6th February, 2018. The Petitioner filed the Petition on 20.3.2018, seeking for various reliefs set out in the Petition.

The Petition is grounded on the following facts:- that the Petitioner was employed by the then Municipal Council of Kitale as a Fire Officer on 20.7.1987. In the year 2000 he was promoted to a Station Fire Officer, Divisional Fire Officer and in 2013, to County Fire Officer, Trans-Nzoia County.

On 3.4.2014, the Petitioner in his capacity as the county Chief Fire Officer wrote a letter to the County Secretary through the County Executive Committee, Public Service Management pointing out that a plot designated for the fire station had been grabbed. The Fire Department was just about to receive a fire engine but no parking space was available. No response was made to the said letter.

By a letter dated 22.8.2018 to the Petitioner received on 29.8.2016, the acting County Secretary called upon the Petitioner to show cause by written response within seven (7) days why disciplinary action should not be taken against him for:-

- i. Overstepping his mandate
- ii. Commenting on a matter before court.
- iii. Undermining the interest of the County Government
- iv. Divulging confidential Government documents to persons outside Government.
- v. Acting irresponsibly and unprofessionally.

The Petitioner on the same date being 29.8.2016 responded to the letter and answered the five (5) allegations. The Petitioner denied having committed the alleged offences.

By a letter dated 6.12.2016, addressed to the Petitioner by the County Secretary, the Petitioner was interdicted from service on half pay and was put on notice that the Respondents intended to dismiss him for gross misconduct. The Petitioner was called upon to answer the allegations in the letter within 21 days.

The Petitioner earned a gross salary of Kshs 63,200. He was on permanent and pensionable terms and was due to retire on 10.6.2023. The interdiction letter did not make reference to earlier show cause letter or the Petitioner's response of 29.8.2016.

The Petitioner on 22.12.2016 responded to the interdiction letter of 6.12.2016 and denied the five (5) allegations.

The Petitioner was invited to attend the County Human Resource Management Advisory Committee meeting on 23.2.2017. The letter of invitation was dated 16.2.2017 and was received on 21.2.2017.

That at the hearing there was no accuser, no member of the County Public Service Board in attendance and there was no hearing conducted by the said committee.

By a letter dated 6.2.2018, signed by the Chief Officer, Public Service Management and sent to the Petitioner on 26.2.2018, the Petitioner was retired in public interest, pursuant to the decision of the County Public Service Board in their meeting held on 24.1.2018.

The Petitioner had not taken his Leave for 2016 and 2017 due to the interdiction which commanded the Petitioner not to leave the work station.

Alleged violations of Rights.

The Petitioner alleges his rights under Section 4(1) 4(3) (a) (b) (e) (f) (g) and 4(4) of the Fair Administrative Actions Act, 2015 were violated in that the interdiction of the Petitioner was not reasonable and procedurally fair. The Petitioner was not given notice prior to the interdiction. The Petitioner was not given an opportunity to be heard. The Petitioner was not given information, material and evidence to be relied upon in making the decisions to interdict him. The Petitioner was not made to hear testimonies of the witnesses that accused him for him to cross examine them. The Petitioner was not notified of the right to legal representation and the Petitioner did not attend the proceedings in person or in the company of an expert of his choice.

The Respondent therefore violated Article 236(b) of the Constitution of Kenya 2010 in that the Petitioner was subjected to disciplinary action without due process of the law.

Furthermore, the Petitioner cites violation of Sections 41 and 45 of the Employment Act, NO 11 of 2007 and Section 76 of the County Governments Act No. 170 of 2012 which prohibits the punishment of a public officer in a manner contrary to the constitution by violating the rules of natural justice.

Further more, the Respondents violated the principles guiding exercise of disciplinary control by the County Public Service Board under Section D 29 of the County Public Service Human Resource Manual and the procedure for retirement on public interest set out in Section L 7.

The Petitioner seeks a declaration that the interdiction was unconstitutional and illegal; hat the retirement in public interest was unconstitutional and illegal;

An order setting aside the retirement in public interest and the Petitioner be paid the half salary withheld from 6.1.2016 to February 2018 in the sum of Ksh 327,750; An order in lieu of leave days not taken in the sum of Kshs 87,400 and an order for the reinstatement of the Petitioner to his employment.

In the alternative, the court to award the Petitioner compensation equivalent to 12 months salary in the sum of Kshs 758,400; Three months salary in lieu of notice Kshs 181,600, costs and interest.

Replying Affidavit.

The Petition is opposed vide a replying affidavit sworn by the County Secretary on 9th January 2019 in which he deposes that the Petitioner was the Fire Officer at the time he wrote two letters one dated 3rd April, 2014 addressed to the County Secretary titled "Grabbed fire station plot" and another dated 27.7.2016 titled 'Confirmation of Plot No. 486 Kitale Municipality Block 4/407 and block 4/487 James Muigai Thugu and Simon Mbugua Thungu".

The letters were not marked confidential. The 1st letter sought the assistance of the County Secretary to reclaim alleged fire station land and the 2nd letter sought support from the County Government to the two named owners of the named Plot in terminating the pending court cases in the Environment and Land court Civil case NO. 30 of 2015 at Kitale Simon Mbugua – vs- County Government of Tran-Nzoia & others and the Environment and Land court Civil Case No. 31 of 2015 at Kitale, James Muigai Thungu -vs- County Government of Tran Nzoia County & others.

The Secretary confirmed that the Petitioner was served with show cause letter dated 22.8.2016 and charged with the aforesaid five offences. That the Petitioner responded on 29.8.2016. Again on 6.12.2016, County Secretary informed the Petitioners that his general conduct and performance as Chief Fire Station Officer was wanting and the Respondents were considering terminating his service. The Petitioner was called upon again to respond to the tabulated offences. The Petitioner did so on 22.12.2016. On 16.2.2017 Petitioner was invited to attend a hearing on 23.3.2017.

That the Petitioner attended the hearing on 23.3.2017 as scheduled. That on 24.1.2018 the Board deliberated upon the Petitioner's case and decided that the matter warranted retirement of the Petitioner in Public interest. By a letter dated 6.2.2018, the Petitioner was retired in public interest which retirement was confirmed by Public service Management (PSM) on 21.3.2018.

That the Petitioner meddled with the land issues outside his mandate to the loss and detriment of the Respondents hence the action taken against him.

The Petitioner was guilty as charged.

The Responded denies all allegations of violation of rights and rules of natural justice and prays the suit be dismissed.

Determination:

The issues for determination are:-

- (a) Whether the Petitioner's rights were violated as set out in the Petition
- (b) Whether the Petitioner is entitled to the reliefs sought.

Issue (a)

The employment position and sequence of events leading to the interdiction of the Petitioner are largely not in dispute. The Petitioner wrote the two impugned letters on subject which was alleged not to concern his office as the Chief Fire Officer and copied the letter to several people. The explanation given by the Petitioner to the two notices to show cause appeared reasonable but did not satisfy the County Government and it communicated as such through the County Secretary.

The Petitioner was called to attend a hearing before County Human Resource Management Committee held on 23.3.2017. What is not in dispute is that the committee convened and the Petitioner went to the venue. However, the Petitioner stated that he was not afforded opportunity to explain his case at all before the committee. The Respondent did not respond directly at all to this allegation nor were minutes of the alleged meeting presented to court.

It is unclear why the County Human Resource Management Committee convened the following day on 24th March, 2017 to deliberate the matter in the absence of the Petitioner.

The issue that the court has to answer is whether the opportunity granted to the Petitioner to explain the five (5) charges twice in writing was sufficient to meet the requirements of fair administrative action and fair hearing.

It is not clear why there were two notices to show cause on the same charges before the interdiction and after the interdiction. If the Respondents were being overly cautious, then it would appear this was not prejudicial to the rights of the Petitioner.

The Respondents had given a legitimate expectation to the Petitioner that he would be given an oral hearing before the issue whether to terminate his employment was considered.

The allegation by the Petitioner that no hearing took place at all on 23.3.2017 gains credence because of any lack of rejoinder or provision of information on the proceedings of that day from the respondents.

The Petitioner did not get a chance to explain why he ought not to be retired in public interest. This action was not contemplated in the notices to show cause issued to the Petitioner and so he had no opportunity to address the matter at all.

It may be true that some instances do not require actual hearing, but however Article 236(b) raises the bar for public officers which provides that no public officer is to be subjected to disciplinary action without the due process of law.

It is our considered finding that due process of the law contemplated includes an actual disciplinary meeting where the Petitioner gets opportunity to meet his accusers, listen to their evidence and challenge it through questions. Then the Petitioner gets opportunity to give his side of the story and questions are posed to him before the panel gets opportunity to deliberate the matter and reach a decision.

There is simply no evidence before court a hearing took place at all and the court finds that the Respondents violated Articles 47 and 236 (b) of the Constitution as read with Section 4 of Fair Administrative Act 2015 and Section 41 and 45 of the Employment Act 2007.

The procedure provided under Section 83 of the County Government Act with regard to retirement in public interest was also not adhered to in the circumstances of the case.

Statutory process are not sweets to be dished willy willy to officers. These are mandatory procedures which provide safe guards to ensure fair administrative action and adherence to canons of natural justice.

In the case of **Njagi Marete -vs- Teachers Service Commission Industrial court at Nairobi cause NO. 379 (N) of 2009** Rika J stated while discussing retirement of Mr. Njagi in public interest and relying on the case of **Industrial court cause NO. 881 of 2010 between Julie Topina Njeru -vs- Kenya Tourist Board** stated

“ Retirement on public interest is a form of termination of employment instigated by the employer, and would therefore fit the description of involuntary termination..... when a public employer justifies the premature termination of a contract of employment on grounds of public interest, such an employer must show its decision is by public policy driven objective and that the decision taken is legitimate and justifiable. It is not enough to merely write a letter to the employee to inform him that a decision to retire him on public interest has been made”.

In the present case, the respondent has also failed to demonstrate that the two letters written by the Petitioner were so injurious to the Respondents that it was no longer tenable to keep him at work until the year 2013 when he was due to retire. The decision to retire must be weighted against the over 30 year of service by the Petitioner to the Respondent without blemish.

This extreme measure weighed against un explained prejudice the county government suffered or was likely to suffer from the letters written by the Petitioner, apparently from over enthusiasm rather than malice cannot be said to be fair, just and reasonable in the circumstances of the case.

The court therefore declares the retirement of the Petitioner in public interest was unlawful, unconstitutional and unfair and violated Articles (41) and 236 of the constitution and Section 4 of the Fair Administrative Action Act 2015 and Sections 41 and 45 of the Employment Act, 2007.

Remedies:

In Marete case, Rika J awarded the Claimant the equivalent of 12 months salary in compensation; in addition to payment of other terminal benefits. In the present case, the Petitioner was paid ½ salary during many months of interdiction. The Petitioner is entitled to payment of the unpaid ½ salary during the period 6.12.2016 to February, 2018 in the sum of Ksh 327,750.

The Claimant seeks reinstatement as the first remedy in this matter. Reinstatement is a remedy provided under Section 49 (2) of the Employment Act, and Section 12 of the Employment and Labour Relations Court Act Cap 234 B laws of Kenya

Reinstatement may only be granted within three years from date of termination in terms of Section 12 (5) of ELRC Act.

In this present case the Petitioner was retired in public interest on the 6th February 2018. Before the court reinstates an employee it has to consider matters set out under Section 49 (4) of the Employment Act. In the present case, the Petitioner has got a few years to his retirement date in 2023. He is of such advanced age that he is unlikely to get an alternative job. The matters that led to the retirement of the Petitioner were not directed to any person within the County Government and therefore his reinstatement would not cause undue friction with the county establishment. It has not been alleged that the Petitioner has been replaced in the position of Chief Fire Station Officer therefore there is no evidence that the position is no longer available. The action taken against the Petitioner was excessive in the circumstances of the case, it cannot be said that he contributed significantly to the unreasonable decision taken by the Respondents. The Petitioner was not paid terminal benefits upon termination and there is no evidence that he has started to receive pension. Furthermore, the common law principle that an employee ought not to be forced on an employer does not hold water in a public office held by the Petitioner.

He was the Chief Fire Station Officer and his retirement had nothing to do with his work performance. Indeed in this case, no-one questioned the fire fighting and administrative qualities of the Petitioner.

Having considered all the above and the case of **Kizito M. Lubano -vs- Kemri Board of Management & 8 Others (2015) eKLR** in which Mbaru J quashed the decision to retire the Petitioner in public interest and reinstated the Petitioner, the court deems it right and just to make an order of reinstatement of the Petitioner.

Accordingly, the court makes the following final orders:-

a) The decision to retire, the Petitioner in public interest on 6th/2/2018 is declared unlawful, null and void and the decision is brought into the Employment and Labour court and quashed.

b) The Petitioner is reinstated to his job of Chief Fire Station Officer without loss of any salary and allowances due to him for 24th January 2018 to date of reinstatement.

c) The ½ salary not paid to the Petitioner from 6.12.2016 to February 2018 in the sum of Kshs 327,550 be paid to him with immediate effect.

d) The Petitioner be paid in lieu of leave days not taken for the years 2016 and 2017 in the sum of Kshs 87,400.

e) Costs of the suit.

DATED, SIGNED and DELIVERED at BUNGOMA this 30Th day of MAY, 2019.

HON. M. N. NDUMA, JUDGE

EMPLOYMENT AND LABOUR RELATIONS COURT

BUNGOMA

Appearances:

Mr. Kiarie for Petitioner

Mr. Masatu for Respondent

Chrispo: Court Assistant.