



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 6 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF ARTICLES 20, 22 AND 23 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2(4), 2(5), 2(6), 3, 10, 27, 41, 50 73 AND 235 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE IRREGULAR, UNLAWFUL, DISCRIMINATORY AND UNFAIR TERMINATION OF EMPLOYMENT OF DANIEL MUTAI

BETWEEN

DANIEL MUTAI.....PETITIONER/CLAIMANT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

ELDORET WATER AND SANITATION LIMITED...2ND RESPONDENT

BOARD OF DIRECTORS,

ELDORET WATER AND SANITATION LIMITED...3RD RESPONDENT

COUNTY GOVERNMENT OF UASIN GISHU.....4TH RESPONDENT

JUDGMENT

Vide petition dated 30th January 2017, filed together with Chamber Summons of even date, the petitioner avers that he was suspended and later terminated from employment contrary to the collective bargaining agreement of the Association of Local Government, Employers and Kenya Local Government Workers Union – National Joint Negotiating Council, that the suspension was contrary to natural justice, the Employment Act and the Constitution of Kenya.

He seeks the following remedies in the petition –

- a) A declaration that the respondent's acts and/or omissions of capriciously reducing the dismissal to become termination from employment without valid reasons is irrational, unconstitutional and unlawful.
- b) That an Order of Reinstatement be and is hereby made directing the 2nd and 3rd respondents to immediately reinstate the Petitioner to his official duty as a Payroll Accountant.
- c) That the claimant be compensated twelve (12) months' salary for unfair termination being (Shs.91,745 x 12 = Kshs.1,100,940/=)
- d) Exemplary damages be awarded to Petitioner for the financial recession due to outstanding Bank loan of Kshs.1.200.000/= which

was being serviced by the Petitioner as at March 2016.

e) An Order for remittance of NSSF contribution as well as 12% p.m. in addition to 15% p.m. of Statutory deductions to the County Pension Fund CFF in line with the CFF regulations to the Petitioner/Claimant's Account.

f) An Order for payment of Three Hundred (300) Unutilized leave days being (Annual

g) Salary multiplied by the number of working days- leave/Accumulated Number of Working Days being- (Kshs.91,745 x 12 x 300 days/254 days in a year Kshs.1,300,322/=)

h) That the Claimant's Gross salary for period as from March-2016 (at the rate of Kshs.91,745 p.m.) to the date of reinstatement in (b) above be immediately reimbursed.

i) Costs of this petition.

In the Chamber Submissions filed simultaneously with the petition, the petitioner seeks the following remedies –

1. That this application be certified as urgent and service thereof be dispensed with in the first instance.
2. That the 2nd and 3rd Respondents be and are hereby compelled to formally produce before the Court the accurate minutes of all meetings held over claimant's discipline and do provide valid reasons for their unilateral decision/action of Termination of Employment of the Claimant.
3. That the 2nd and 3rd Respondents be compelled to reinstate the Applicant/Claimant to his position as Payroll Accountant and be paid his full salaries and/or benefits for the period in which he was out of employment.
4. 4- That a conservatory order be issued restraining the Respondents or any of them and any State Officer or organ of state from carrying on with the process of withholding Applicant/Petitioner's salary, and/or terminal benefits.
5. 5« That pending the hearing and determination of the substantive Constitutional Petition, Conservatory Order be issued restraining the Respondents or any of them and any State Officer or organ of state from carrying on with the process of filling the Applicant/petitioner's vacancy and/or appointment.
6. That in the alternative to (2) and (3) above a Declaratory Order be and is hereby issued that it would be unconstitutional for any person, state officer or state organ to carry on with the process of appointment, halting the payment of salary, pension, statutory deduction and/or terminal benefits of the Applicant/Petitioner.
7. That the costs of this Petition be provided for.

The petition and application we supported by the affidavits of DANIEL MUTAI both sworn on 30th January 2017.

The petition is filed against the respondents who are described as follows –

The 1st Respondent is the Attorney General of the Republic of Kenya. He is joined to this Petition as Respondent pursuant to the provisions of Article 156 of the Constitution of the Republic of Kenya in his capacity as:

- a. The principal legal adviser to the Government of the Republic of Kenya.
- b. The person authorized by law to represent the National Government in court or in any other legal proceedings to which the national government is a party.

The officer of government under a duty to promote, protect and uphold the rule of law and defender of the public interest.

The 2nd Respondent is Eldoret Water and Sanitation Company Limited, a Public Limited Company having its registered office in Eldoret and carrying business, inter- alia of, Water and Sewerage services and is sued in its capacity as the petitioners' Employer. (Service for purposes of this suit shall be effected through the petitioner's Advocates) and still remains an agent of the 4th Respondent by dint of the County Government Act, and as an agent it could have limited authority on the transferred staff from the defunct Municipal council of Eldoret.

The 3rd Respondent are the Board of Directors of the 2nd Respondent and sued in their capacity as persons in charge of operational affairs of the 1st Respondent. (Service for purposes of this suit shall be effected through the petitioner's Advocates)

The 4th Respondent is the County Government serving in Uasin Gishu, in charge of the running of the 2nd and 3rd Respondents the existing framework from the first Employer of the Applicant- having taken over from the defunct Eldoret Municipal Council.

The 1st and 4th respondents were discharged from the proceedings by orders made on 23rd March 2017 and thus only the 2nd and 3rd

respondents participated in the proceedings renamed as the 1st and 2nd respondents respectively. The petition was on the requests or the parties disposed by way of written submissions.

Facts

The facts of this petition according to the petitioner are as follows –

The petitioner was employed by the defunct Eldoret Municipal Council on 22nd August 2000 and was by letter dated the same day transferred to Eldoret Water and Sanitation Company Limited, the 3rd respondent in the petition, (now the 1st respondent after the striking out of the 1st and 4th respondents).

On 3rd March 2016 he was suspended from duty on grounds of suspicion that he was engaged in fraudulent practices by altering and manipulating staff returns to Wareng Sacco. While on suspension he was to be on half salary. The letter of suspension stated that the suspension was for a period “*not more than 3 months*” and was to pave way for further investigations.

By letter of notice to show cause dated 22nd March 2016 the petitioner was required to show cause within 7 days why disciplinary action including summary dismissal should not be taken against him for manipulation of staff data and shares meant to be paid to Noble Savings and Credit Co-operative Society (formerly Wareng Teachers Sacco). The letter stated that records in the custody of the 1st respondent indicated that the petitioner was involved in manipulation of data in the payroll system to benefit from wrongful deductions made from members of staff to service his loans acquired from the Sacco. That this amounted to gross misconduct by the petitioner contrary to the terms and conditions of service of the copay and Section 44(4) (c) and (g) of the Employment Act, 2007.

In his response to the letter of notice to show cause dated 28th March 2016, the claimant denied the allegations made against him. He stated that his access rights in the payroll system was to break down the lump sum figures into shares, loans and interest in excel sheet as per format from Noble Sacco and that whenever there were discrepancies in the breakdown amounts the Accountant of Noble Savings and Cooperative Society would take up the same with him for correction.

He further stated that he would have expected to be informed of how much was manipulated, how much serviced the alleged loans, who were the members involved and when the anomaly took place. He stated it was difficult for him to show cause when the information given was scanty.

The claimant was by letter dated 10th May 2016 invited for a Disciplinary Committee Meeting to take place on 16th May 2016 at 9 am in the Company’s Boardroom. At the meeting, the claimant demanded more particulars of the charges against him, which he was supplied with by letter dated 17th May 2016. He was again invited for another disciplinary hearing on 27th June 2016.

At the hearing, the clamant stated that the variations in the entries he made were an error and pleaded to be pardoned.

The committee found him guilty of fraud and recommended separation by way of dismissal.

The claimant appealed against dismissal following which his dismissal was reduced to a normal termination with full terminal benefits.

It is the petitioner’s case that his suspension was erroneous as he was suspended on 3rd March 2016 before, he was served with a notice to show cause on 22nd March 2016, without being given a chance to defend himself, that this was contrary to the CBA and rules of natural justice. That he denied all the charges against him. That his access rights to payroll system was limited to approval of data entry, payroll processing and generating printouts only.

The petitioner further contends that Noble Savings Credit Society which is an independent entity from the respondents did not make any complaints against him or about inaccurate members’ shares. He further contends that the list of members alleged to have been disadvantaged by the alleged fraud were not called to testify against him at the disciplinary hearing nor did they raise any complaints against him, that there was no fraud as no amount of money was lost by the respondents and no financial audit was provided to the disciplinary committee to prove data manipulation of the payroll. He avers that there was no valid reason for the termination of his employment contract and further that there was no valid reason given to change his dismissal to normal termination by the Appeals Committee.

It is further the petitioner’s case that his letter of appointment by the Local Authority was still in force implying that the respondents had no authority to terminate his employment.

It is the petitioner’s averment that his constitutional and statutory rights were violated by the respondents who discriminated against him, failed to accord him a fair hearing, denied him salary, wrongfully suspended then dismissed him from employment, failed to remit his statutory deductions, pensions and terminal benefits. Further that the respondents failed to accord him labour standards in accordance with International labour standards.

In the written submissions filed on behalf of the petitioner, he avers that the respondents breached Article 47 of the Constitution and Section 4 of the Fair Administrative Actions Act and the Rules of Natural justice. He relied on the decision in the case of **R –V- Altringham Justices Ex parte Pennington (1975)** to the effect that no man can be Judge in his own case, acquiring that the Acting Managing Director, Mr. J. K. Kemboi having sat in the disciplinary committee ought not to have sat in the appeal. He further relied on the case of **Ridge –V- Baldwin (1964)** on the principal of *audi altaram partem*.

The petitioner further cited the case of **Banco Espanol Filipino –V- Palanea, 31 Phil. 921, 934 (1918)** which enumerated the principles that

- (1) *There must be a court or tribunal clothed with judicial power to hear and determine the matter before it;*
- (2) *Jurisdiction must be lawfully carried over the person of the defendant or over the property which is the subject of the proceedings;*
- (3) *The defendant must be given the opportunity to be heard;*
- (4) *And judgment must be rendered upon lawful hearing.*

He also relied on the case of **Ang Tibay v Court of Industrial Relations, 69 Phil. 635 (1940)**, in which the court enumerated that it termed as being “*cardinal primary requirements*” of procedural due process in administrative proceedings:

- (1) *The right to a hearing, which deludes the right to present one’s case and submit evidence in support thereof;*
- (2) *The tribunal must consider the evidence presented;*
- (3) *The decision must have something to support itself;*
- (4) *The evidence must be substantial. Substantial evidence means such reasonable evidence as a reasonable mind accept as adequate to support a conclusion;*
- (5) *The decision must be based on the evidence presented at the hearing, or at least contained in the record and disclosed to the parties affected;*
- (6) *The tribunal or body or any of its judges must act on its own independent consideration of the law and facts of the controversy, and not simply accept the views of a subordinate;*
- (7) *The Board or body should, in all controversial questions, render its decision in such manner that the parties*

He submitted that the reason given for the termination of his employment was not valid.

The petitioner further submitted that the respondents did not comply with Section 30 of the terms and conditions of service for officials of Local Authorities which provided that “...suspend officer from duty until the matter has been investigated.” And further that “*the maximum period of suspension to be 3 months.*” He submitted that he was suspended on 3rd March 2016, issued with a letter of notice to show cause on 22nd March 2016 and called for disciplinary hearing on 16th May and 27th June 2016.

He submitted that in the landmark case of **Council of Civil Service Unions –V- Minister for the Civil Service** Lord Diplock noted in that “failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice”, is a form of procedural impropriety

He further relied on the US case of **Hagar –V- Reclamation Dist.** in which it was held that

"Due process of law is [process which], following the forms of law, is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. Any legal proceeding enforced by public authority, whether sanctioned by age or custom or newly devised in the discretion of the legislative power, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

The petitioner urged the court to find in his favour and grant him the prayers sought in the petition on grounds that –

- a) The Board of Directors constituting the Disciplinary Committee was a biased tribunal.
- b) The petitioner was not given sufficient Notice of the proposed action and the grounds asserted for it.
- c) The petitioner was not given opportunity to present reasons why the proposed action should not be taken.
- d) The petitioner was denied the right to present evidence, including the right to call witnesses.
- e) The petitioner was not given an opportunity to know opposing evidence.
- f) The petitioner was denied the right to cross-examine adverse witnesses.
- g) Requirement that the tribunal prepare written findings of fact and reasons **for** its decision.

h) The petitioner appealed on 23rd September 2016 to the Finance Committee Board and recommendations were made that he be reinstated to his position but again **due to malice and** mischief on the part of the Managing Director he was sacked unprocedurally.

Respondent's Case

The respondents filed a memorandum of response dated 24th April 2017 in which they deny that the constitution of Kenya, 2010 was ever an instrument of contractual engagement between the petitioner and the respondents. They aver that the relationship between the petitioner and respondents were predicated upon the Employment Act, the Labour Relations Act and instruments constituting human resource manual and terms and conditions of employment captured in the Collective Bargaining Agreement between the Association of Local Government, Employers and Kenya Local Government Workers Union.

That the Petitioner was properly dismissed under the provisions of the Employment Act 2007. Under Section 45(2)(b)(i) of the Employment Act, the conduct of the Petitioner was wanting and incompatible. From the incident that led to the disciplinary process and his admission of such inconsistencies and inaccuracies in the payroll attributed to him, the Petitioner demonstrated that he was incapable of being trusted. His position was that of trust and once the same was compromised, then it became unconscionable to retain him. This was the position of this court in the case of *Moses Chavangi vs. Barclays Bank of Kenya Ltd - ELRC No. 694 of 2010* cited with approval in;

(i) ELRC No. 149 of 2013 – Abraham Asiago vs. Barclays Bank Ltd

(ii) ELRC No. 1009 of 2012 – BIFU vs. Post Bank Limited

That the Petitioner's act and behaviour amounted to gross misconduct and he contributed greatly to the action by the Respondent to terminate his services. That the investigations carried by the respondents out revealed that there were several inconsistencies with the totals and that books of accounts were not kept properly.

That during the investigations it was also discovered that the Petitioner had manipulated the data in the payroll system where evidence of wrongful deductions were made for *inter alia* the benefit of the Petitioner's loan with the Sacco. That the Petitioner could not properly explain why such inconsistencies were prevalent and instead attributed it to human error which he claimed had been sorted out. That such explanation during hearing made the Petitioner come out as one who did his job carelessly and in a casual manner.

The respondents submitted that the procedure for terminating the Petitioner's services was fair as he was afforded an opportunity to be heard and be represented by colleagues/union representatives of his choice. That the Petitioner responded to the show cause letter but failed to address himself to the issues that were raised. Instead, he embarked on a vigorous attack on the show cause letter and the person who had prepared it hence the response failed to answer the questions that were directed at him.

Furthermore, it is submitted, the Petitioner did not respond to the crucial question of why he had used the irregularly secured funds from his colleagues which he ought to have posted to their accounts to clear his loan obligations, clearly in total disregard to the objectives of the Sacco.

That the Respondent having been dissatisfied with the response to the show cause letter invited the Petitioner to make verbal representation before a disciplinary committee. He appeared before the committee and made his representations. He was given enough time to prepare and attend the meeting.

The committee having listened to the representations of the Petitioner found that he had failed to discharge his duties keenly and therefore recommended that his services be dismissed. He was issued with a letter stating the reason for his dismissal.

It is submitted that the fact that the Petitioner alleged that no money was lost did not discharge him from his substantive obligation, which was to prudently handle the Sacco members' money. The issue of trust was seriously compromised. The Respondent submitted that the reason for termination was valid and therefore the Petitioner cannot be heard to say that he was not accorded a fair hearing neither can he allege that the reason was not valid having been the person entrusted with the responsibility of keeping the money belonging to the Respondent's employees who were members of Noble Savings and Credit Co-Operative Society (formerly Wareng Sacco).

That after his dismissal, the Petitioner lodged an appeal, which was considered and the same was found to have disclosed no new grounds or compelling reason to reverse the decision of the disciplinary committee. The Respondent, notwithstanding that it viewed the conduct of the Petitioner as that of gross misconduct warranting summary dismissal, nevertheless reduced it to normal termination.

That the substantive and procedural threshold in effecting the termination was met as set out in the case of *Harrison Muhia Mwangi vs. Standard Chartered Bank Ltd - ELRC No. 678 of 2013*.

The respondents pray that the petition be dismissed with costs to the respondents as it is an abuse of court process and unmeritorious.

Determination

I have considered the pleadings and submissions on record. I have further considered the documents and authorities filed by the parties. The following are the issues arising for consideration –

1. Whether there are any constitutional issues raised in the petition.

2. Whether the termination of the petitioner's employment was for valid reason and complied with fair procedure.

3. Whether the petitioner is entitled to the remedies sought.

On the first issue, the respondents in both the response to the petition and in the submissions aver that there are no constitutional issues arising from the termination of the petitioner's employment. The petitioner referred to Articles 2(10), 2(5), 3, 10, 20, 22, 23, 27, 28 and 41. The petitioner however did not relate any of these Articles to the facts of his case.

In the case of Anarita Karimi Njeru, the court established the principle that in matter concerning the enforcement of fundamental rights and freedoms, a petitioner must plead with particularity that of which he complains, the provisos said to have been infringed or threatened and the manner in which the particular right is violated. That the petitioner merely citing articles of the constitution without demonstrating how those provisions have been violated.

Further, the termination of the petitioner's employment is a contractual governed by his contract and the terms and conditions of employment and as pleaded in the petition, the remedies are available within the Employment Act. In **David Ramogi and 4 Others –VS- The Cabinet Secretary, Ministry of Energy and Petroleum and 7 Others (2017) eKLR, Constitutional Reference No. 531 of 2016**, the court observed that -

“Courts have also on numerous occasions emphatically ruled that where there is a specific mechanism given for resolution of disputes, then that must be followed and that the Constitution is not meant to replace the existent statutory regime. That is why for instance a constitutional petition solely claiming maintenance and custody of children and which invokes say, Article 53 of the Constitution on equal parental responsibility is likely to be rerouted back to the Children's court for hearing and determination.”

For the foregoing reasons I agree with the respondents that the relationship between the claimant and the respondents is contractual and that the provisions of the Employment Act provide adequate relief for the acts complained of. I will thus treat the claims herein as if the petitioner had filed an ordinary claim.

The second issue for determination is whether the termination of the petitioner's employment was fair both procedurally and substantively. Substantive validity relates to the reason for termination. The petitioner was dismissed for as stated in the letter of dismissal, fraudulent manipulation of data in the payroll by making unauthorized deductions from salaries of fellow employees, which he remitted to his account at Noble Sacco. He was at his request supplied with particulars of samples of names and amounts irregularly deducted. At the disciplinary hearing he attributed these to human error. He was however unable to explain how he serviced his loans at Noble Sacco without effecting deductions from his own salary on the payroll. He was accused of using the irregularly deducted monies to service his loan at the SACCO, an accusation he failed to satisfactorily respond to at the hearing. I therefore find that there was valid reason for subjecting the petitioner to disciplinary process.

On the procedural fairness, the petitioner raised several complaints. He avers he was not given a fair hearing, yet he was given a hearing on 26th May and 27th June 2016 and further, a hearing of his appeal on 25th October 2016. These were after he had been given an opportunity to responded to the accusations against him through the notice to show cause letter.

He alleged bias on grounds that the Acting Managing Director sat both at the hearing of the disciplinary committee and on appeal. It is clear from the letter inviting the petitioner to the appeal that he appeared before the Board Finance Committee, and from the minutes of the appeal review Minutes that it is the full board, which recommended that his appeal be reviewed by the management. It is further evident that at the time Mr. Kemboi sat on the disciplinary committee he did so in his capacity as a Head of Department while at the appeal hearing he sat in his capacity as Acting Managing Director. The petitioner did not produce any terms and conditions of service or regulations on discipline that prohibited Mr. Kemboi from sitting on both committees. He further did not adduce any evidence to prove that he suffered any bias as a result of Mr. Kemboi sitting in both committees.

The petitioner's complaints about suspension before being issued with a notice to show cause are unfounded as the purpose of suspension is for an employee to step aside so that investigations can be carried out while he is away from office for reasons ranging from interference with investigations to embarrassment of carrying on investigations in the presence of an accused employee. The CBA cited by the petitioner confirms that an employee may be suspended to allow for investigations. This is at paragraph 30(a) of the CBA produced by the petitioner.

The issue raised by the petitioner about the locus standi of the respondents to dismiss him are not valid as he was an employee of the respondents by virtue of his letter of transfer dated 22nd August 2000 which is also the date of his appointment by the respondents by separate letter of the same date. This fact is supported by the fact that in this petition he has sued the respondents which he refers to as his employers.

From the foregoing, I find that the respondents, had valid reason to dismiss the petitioner and that he was subjected to fair procedure.

Remedies

The petitioner sought a declaration that the reduction of his dismissal to termination was irrational, unconstitutional and unlawful. I do not understand the basis of this prayer as this was done pursuant to his appeal and for his benefit to enable him become entitled to his terminal benefits. It is not irrational, unlawful or unconstitutional to reduce a dismissal to a termination to enable an employee receive his terminal benefits.

The petitioner further prayed for reinstatement. Having failed to establish unfair termination, he is not entitled to the same. He is for the same reasons not entitled to compensation a prayed, or to exemplary damages, NSSF contributions, pensions or salary after the date of

termination.

The result is that the entire petition fails and is accordingly dismissed.

Each party shall bear its costs.

DATED AND SIGNED AT NAIROBI ON THIS 25TH DAY OF APRIL 2019

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 23RD DAY OF MAY 2019

MATHEWS NDERI NDUMA

JUDGE