



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 34 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 7th May, 2019)

SHEBBY SAKWA.....1ST PETITIONER

DAVIES NJUGUNA.....2ND PETITIONER

VERSUS

FAZUL MOHAMED.....1ST RESPONDENT

NGOS COORDINATION BOARD.....2ND RESPONDENT

CABINET SECRETARY MINISTRY OF DEVOLUTION PLANNING....3RD RESPONDENT

ATTORNEY GENERAL OF KENYA.....4TH RESPONDENT

JUDGEMENT

1. The Petitioners, Shebby Sakwa and Davies Njuguna filed a Petition dated 04/02/2016 then thereafter filed an Amended Petition dated 11/11/2017 (with Statement of Claim) against the 1st Respondent-Fazul Mahamad, 2nd Respondent-NGOs Co-ordination Board, 3rd Respondent- CS Ministry of Devolution Planning and 4th Respondent-the Attorney General of Kenya.
2. They aver that the 1st Petitioner had been employed by the 2nd Respondent as an Administrative Assistance in 2003 for 13 years and that the 2nd Petitioner is a Secretary of the Nairobi Regional Network of Non-Governmental Organisations who has previously served as an Executive Member of the National Council of NGOs (Finance & Administration Committee).
3. That despite clear regulations and guidelines on qualifications for the position of Executive Director of the NGOs Co-ordination Board, the 2nd Respondent has not paid any regard to the authenticity and veracity of the 1st Respondent's qualification documents and that the 3rd Respondent has also failed to carry out investigations addressing/ to dispel these allegations.
4. That the continued disregard of law and policy on appointment of CEOs of state corporations is an infringement and violation of provisions of the 2010 Constitution of Kenya and they highlight **Articles 10, 22, 23, 73, 75, 153, 232, 258 and 259 of the Constitution.**
5. That sometime in mid-2015, the National Council of NGOs received an anonymous complaint letter on activities going on within the 2nd Respondent Board and raised issues regarding irregular actions undertaken by the 1st Respondent including massive suspensions, interdictions and dismissal of staff members, irregular transfers as punishment, promotions to senior management positions among others.
6. That the letter further raised issues of sexual harassment that were later reported in the media and that many of these actions were carried out unilaterally and unprocedurally as there had been no Board of Directors since March 2015. Further, that the said letter raised suspicion that the 1st Respondent may have given false information regarding his qualifications and unlike the rest of the staff whose files were ordinarily kept by the HR officer, his employee file was kept in his office.
7. That the National Chair of the National Council of NGOs Mr. Wilson Kipkazi acted on these allegations and wrote to the VC Egerton University on 03/09/2015 requesting for information on the academic qualifications of the 1st Respondent. That the university's Registrar (Academic Affairs), Prof. S.F.O. Owido responded on behalf of the VC on 10/09/2015 stating that the 1st Respondent had been discontinued

in his 3rd year of study by the Senate on 26/08/2010 for failing 50% or more of all the credit factors taken in one academic year.

8. Further, that the 1st Respondent lacked the requisite 5 plus years' experience to hold such a position and that the National Council of NGOs being unable to forward this information to the Board of Directors, took steps to have the issue highlighted.

9. The 1st Petitioner, Shebby Sakwa in the Statement of Claim within the Petition avers that the issue in dispute is the unfair termination of her employment by the 1st and 2nd Respondent and that at the time of her unfair dismissal, her salary was Kshs. 86,000/=. That she served the 2nd Respondent diligently and with loyalty until she was issued with a backdated letter dated 22/02/2016 summarily dismissing her from employment and that she was at work at the Kisumu Office until the end of April 2016.

10. She contends that her dismissal from employment was a reaction to her decision to file this Petition together with the 2nd Petitioner challenging the qualifications of the 1st Respondent. That she has on several occasions contested accusations levelled against her and further refused to attend a disciplinary hearing because she felt those appointed to investigate her would be unfair and had already decided on her guilt.

11. In her Witness Statement dated 19/11/2018, the 1st Petitioner stated that Justice Abuodha had issued an order on 04/02/2016 restraining the 1st Respondent from dismissing, recruiting and replacing members of the 2nd Respondent Board but that she was not let into the premises of the 2nd Respondent's offices even after service of the Order.

12. That she learnt the 1st Respondent had successfully varied the said orders before Justice Nduma on 29/04/2016 saying that they would only apply to her and that her family has greatly suffered from the unfair decision of the 1st and 2nd Respondents to dismiss her from employment.

13. The Petitioners pray for the following reliefs:-

a. A Declaration that the 1st Respondent has violated Articles 10, 73 and 75 of the Constitution.

b. A Declaration that the 2nd and 3rd Respondents are in breach of Articles 153 and 232 of the Constitution.

c. A Declaration that the 1st Respondent is unfit to hold the office of Executive Director to the NGOs Coordination Board.

d. A Declaration that the termination of the 1st Petitioner (claimant) was unfair.

e. Compensation for unfair dismissal.

f. An Order for reinstatement of the 1st Petitioner (Claimant).

g. This Honourable court to issue such further orders and give such directions as it may deem fit to meet the ends of justice and the protection of the Constitution and in the context of the declarations made.

h. The costs of the Petition be awarded to the Petitioners against the Respondents jointly and severally.

14. The Respondents filed a Replying Affidavit dated 13/05/2016 sworn by the Legal Manager of the 2nd Respondent, Mr. Lindon Nicolas Otieno who avers that the 1st Petitioner's services were terminated for gross misconduct and use of abusive language against her seniors at the work place and that this was after a disciplinary process that commenced on 11/12/2015.

15. That the 2nd Respondent received a complaint from an employee (marked **LNO-1**) seeking intervention by the 1st Respondent on a loan with a certain financial institution that they had guaranteed the 1st Petitioner and which she had defaulted in repaying. That consequently, the guarantors were being held liable for the 1st Petitioner's fault and the HR & Development Manager of the 2nd Respondent then made an administrative inquiry into the same on 04/12/2015 being that it had been guaranteed by fellow employees.

16. That the 1st Petitioner then issued threats to the said Manager in the presence of fellow employees and that the 1st Respondent even received witness statements annexed as **LNO-2** from employees who had witnessed this unprofessional conduct of the 1st Petitioner. That the 1st Petitioner was issued with a show cause letter on 07/12/2015 to explain herself to which she responded on 10/12/2015 denying the occurrence of the incident and claiming she was on leave during the incident.

17. That she was then suspended from duty by the 1st Respondent on 11/12/2015 for 3 months so as to allow for investigations and conduct of disciplinary proceedings and was required to report at her duty station once every week, which did not happen.

18. That the 1st Petitioner responded to her suspension letter on 15/12/2015 as per annexure marked **LNO-6** indicating that she was not intending to attend the disciplinary hearing and stating that the 1st and 2nd Respondents and/or its disciplinary mechanisms had no capacity to deal with the matter at all.

19. That the 3rd Respondent received a letter on 04/01/2016 from the Secretary/CEO of the Public Service Commission and inquired for information from the 1st Respondent which was provided on 21/01/2016 as seen in annexure marked **LNO-7**. That on 08/01/2016, the 2nd Respondent invited the 1st Petitioner for the disciplinary hearing on 28/01/2016 and advised her to come with a colleague/representative but she failed to turn up and that on 11/02/2016, the committee proceeded to hear the 1st Petitioner's case.

20. That after testimonies from the HR Manager and two witnesses, the committee made a finding and noted that she had received a final warning on 18/08/2015 and thus recommended her summary dismissal. That the 1st Respondent then implemented the committee's decision and dismissed the 1st Petitioner and that she has filed this Petition for speculation purposes so as to frustrate the operations at the 2nd Respondent's organization.

21. The 1st Respondent avers that he applied for the Executive Director position after seeing an advertisement in the Standard Newspaper on 24/10/2014 and was subsequently invited for an interview at the 2nd Respondent's Boardroom on 11/11/2014.

22. That the interview process was thorough and competitive and he performed well by scoring high marks of 94% in answering the panelists' questions and that the interviewing committee chose three candidates for further recommendation to the full Board for consideration. That the 2nd Respondent then held a special board meeting on 20/11/2014 and forwarded the said 3 names to the CS who made her decision to appoint him the Executive Director of the 2nd Respondent Board.

23. That he signed his employment contract on 24/11/2014 for 3 years with an option of renewal of appointment upon a written request of at least 6 months before expiry of the contract and that the appointing authority did not require that the holder of the Executive Director position must possess a university degree as the same is not set out in law either expressly or impliedly.

24. Further, that his removal must also follow due procedure as per the Employment law and the Fair Administrative Actions Act and that the prayer seeking to have him suspended by Court without such due process is unconstitutional.

25. That the Petitioners have not given any tangible evidence before this court to substantiate the assertion that he gave false information regarding his qualifications or that the 1st and 2nd Respondents have exceeded their mandate under the Act. That the Petitioners can direct their grievances to the Board, which is independent from the management and has an oversight role over the 1st and 2nd Respondents and that he replaced the vacant positions of staff who had exited the organization in the last two years with authority from the 3rd Respondent on 26/01/2016.

26. That all recruitment that has taken place has been with the necessary authorizations with all changes and transfers being undertaken as per the 2nd Respondent's HR Manual and that the Petitioners are intruding into managerial responsibility against the doctrine of separation of powers.

Petitioners' Submissions

27. The 1st Petitioner submits that anything that was done by the 1st Respondent while he was Executive Director of the 2nd Respondent board was aimed at pushing her out of employment and that his qualifications and credentials were always questioned by the public. That the submissions by the Attorney General that the qualification for the executive director position was not set out in the Act is a mockery and a disregard of **Chapter 6 of the 2010 Constitution on Leadership and Integrity**.

28. The 1st Petitioner submits that the Respondents have not substantively proved to this court the reasons for her dismissal nor have they submitted employment records addressing her claims as required by **Section 10(6) and (7) of the Employment Act**. She relies on the case of **Stephen Mbugua Chege –v- Nairobi City Water & Sewerage Company [2017] eKLR** which quoted the court of appeal in **International Planned Parenthood Federation –v- Pamela Ebot Arrey Effiom [2016] eKLR** on the proof of reasons of termination being upon the employer as per **Section 43 of the Employment Act** and failure to which termination is deemed unfair within the meaning of **Section 45**.

29. The Petitioners submit that this Court should order for the 1st Petitioner/Claimant's reinstatement unconditionally as was observed in the case of **Mary Chemweno Kiptui –v- Kenya Pipeline Company Limited [2014] eKLR** where the court observed in paragraph 50 that the termination had not followed the respondent's rules of procedure and was contrary to public interest and proceeded to reinstate the claimant to her position with the respondent therein, with all her back salary, allowances, benefits and any other legal dues within 30 days from the date of the judgment.

Respondents' Submissions

30. The 1st and 2nd Respondents deny that they interfered with the employment of the 1st Petitioner and that she accumulated many warning letters due to her incessant behaviour that led to her dismissal and not for filing this Petition.

31. That the termination procedure followed due procedure as stipulated under **Section 41, 43 and 44 of the Employment Act** and that it has proved the same as required by **Section 45(2)(c)** of the Act. That the 1st Petitioner contravened **Clause 10 of the HR Manual** and **Section 44(4)(d) of the Employment Act** and was given a chance to defend herself but declined to appear.

32. They submit that the issue of appointment and qualification of the 1st Respondent are overtaken by events and should not be considered by the court as his tenure expired and there is a new Executive officer in office. That it is trite law that a court does not issue court orders in vain as was held in the case of **B –v- Attorney General [2004] 1 KLR 431** that a court should not be seen to make orders in vain as it would be exposed to ridicule.

33. That the 1st Petitioner should not be reinstated back to employment as the 3 year rule lapsed on 04/02/2019, she has also not proved her case of an exceptional circumstance as per **Section 49(4)** of the Employment Act and further, the 2nd Respondent does not wish to employ her. That since she has failed to demonstrate that the termination was unfair, she is therefore not entitled to any compensation and that her claim that her constitutional rights were violated are misguided.

34. That the Petitioners have also not demonstrated and/or particularised the elements of breach and violation as against the 1st Petitioner as was held by the court in **Judicial Service Commission –v- Gladys Boss Shollei & another [2014] eKLR**.

35. Further, the 1st and 2nd Respondents pray for costs since it is the Petitioners who dragged them to court and failed to prove their case and that the Amended Petition be dismissed and for the Court to uphold the decision to terminate the 1st Petitioner.

36. The 3rd and 4th Respondents submit that as has been established in the **Anarita Karimi Njeru –v- The Attorney General (1979) KLR 54**, he who alleges must prove and that this decision set the threshold to be met in a petition alleging constitutional violations stating that the provisions should be pleaded with precision.

37. That none of the allegations against the 1st Respondent were presented to the relevant authorities including the Board to investigate and so the allegation that the 3rd Respondent did not act in accordance with Article 152 and 232 are unsubstantiated.

38. That the 1st Petitioner neither reported her claim of sexual harassment against the 1st Respondent to the police or the relevant internal organs of the office and that this Petition offends **Article 50 of the Constitution** because it seeks for orders to dismiss the 1st Respondent without a fair hearing.

39. I have examined all the averments by both Parties. I set the following as the issues for determination:-

1. Whether the Claimant's rights were infringed upon as set out in the Amended Petition.

2. Whether the Claimant was unfairly terminated by the Respondent.

3. What remedies this Court can grant.

40. On the 1st issue, the Petitioner filed this Petition on 5.2.2016 and an Amended Petition on 11.10.2017. In the Amended Petition, the Petitioner sought orders from this Court declaring violation of Articles 10, 73, 75, 153 and 232 of the Constitution. He also sought orders declaring that 1st Respondent was an unfit person to hold the office of Executive Director of the NGO Coordination Board by virtue of his academic qualifications.

41. Violation of Article 10 was cited in regard to the 1st Respondent in relation to his qualifications as Executive Director of NGO Coordination Board. It was further pleaded that he hired his relatives and friends in the Board and made unilateral decisions for the 2nd Respondent in breach of Article 73 and 75 of the Constitution.

42. 2nd and 3rd Respondent are cited for breaching Article 153 in their failure to scrutinize and carry out due diligence to ascertain the qualifications and credentials of the 1st Respondent.

43. The 3rd Respondent is also cited for breaching Article 232 of the Constitution.

44. The 1st Respondent was Executive Director of the 2nd Respondent vide a 3 year contract with effect from 21.11.2014. His contract thus ended in November 2017. It would therefore be futile to make any order in relationship to his right to service as Executive Director of the 2nd Respondent as the matter is now overtaken by events.

45. However, in relation to his breach if any to carry out his duties at the Board as expected and about the violation of the constitution in relation to the cited articles, this Court is still clothed with jurisdiction to pronounce itself upon it.

46. In addressing this issue, the Petitioner submitted that the 1st Respondent was not a holder of a University degree and so was not qualified to hold the office he did which fact he did not disclose and which the 2nd and 3rd Respondent did not follow up to establish.

47. The Petitioner has submitted that the advertisement placed in the Daily Nation of 24.10.2014 had stated that for appointment to the position of Executive Director of the NGO Organisation Board, the candidate was to be a holder of a Bachelor degree amongst other qualifications.

48. The Petitioner has averred that the 1st Respondent had passed off as holding a degree from Egerton University which fact was denied by the University as per Appendix DN3. Indeed if the qualifications set in the advert required a degree holder to be Executive Director, the 1st Respondent having passed off as being so qualified was in breach of Article 10 of the Constitution which relates to integrity.

49. The 2nd Respondent also erred in continuing with the recruitment process without doing due diligence to establish that the 1st Respondent held the requisite qualifications for the position.

50. The 3rd Respondent submitted that the advert was in breach of express provisions of the law. However, what is in issue before me is whether the 1st Respondent was qualified as per the advert and not whether the advert was in conformity with the law.

51. In the circumstances, I do find as prayed by the Petitioner that indeed the Respondents breached express provisions of the Constitution with the 1st Respondent breaching Article 10.

52. As for Article 73 and 75, the Petitioner did not provide evidence of the breach by the 1st Respondent in the way he exercised his duties. The Petitioner only averred that the 1st Respondent promoted nepotism and tribalism but she did not set out in clear terms how this was carried out. I will therefore find the 1st Respondent was culpable only in terms of Article 10.

53. As for 2nd Respondent and 3rd Respondent the breach was in as fair as they failed to do due diligence before recruiting the 1st Respondent in office as Executive Director of 2nd Respondent. There is however no clear relation with this act on omission in relation to Article 153 and 232 of the Constitution as submitted by the Petitioner.

54. Article 153 deals with Cabinet decisions and Article 232 with the Public Service. I did not find a clear breach accordingly in relation to these provisions of the Constitution and the Petitioner failed to point out the breaches complained of under the Constitution.

55. On the 2nd issue, the Petitioner has submitted that she was unfairly terminated by the Respondent.

56. From the documents produced before this Court, the Claimant was employed by the 1st Respondent on 7.7.2003 as a Subordinate Staff on temporary terms of service of 6 months. With time, her services were reviewed and on 22.6.2004 she was confirmed in employment as Support Staff and admitted to permanent and pensionable terms of service with effect from 1.1.2004.

57. From the records, she was issued with some warning letters for neglecting her duty and for gross misconduct which included non-performance of her duties and disrespect to her seniors. She was even suspended from duty on 17.6.2011.

58. On 11.5.2015, the Petitioner was issued with a show cause letter for the reason that on 8.5.2015, she responded to an email addressed to staff using objectionable language. She was then asked to report to the office of the Executive Director on 11.5.2015 at 9 am to explain what she meant in the said email and that she did not.

59. She was asked to show cause why disciplinary action should not be taken against for:-

1) "Use of objectionable language while responding to a decision made by her superior.

2) Refusing to report to the Executive Director's office as directed by the Executive Director through the Human Resource and Development Manager".

60. The Petitioner seems to have responded to this letter and on 18/8/2015, she was issued with a final warning letter (page 34 of Claimant's documents).

61. On 7.12.2015, however the Petitioner was issued with another show cause letter for threatening the Head of Human Resource on 4.12.2015 when she inquired about the Petitioner's loan with Family Bank. She was asked to show cause why disciplinary action should not be taken against her for using objectionable and insulting language to the Human Resource and Development Manager and also by threatening to beat her up.

62. This show cause letter was responded to on 10.12.2015 by Alphonse Mutinda and Company Advocates denying the accusations levelled against the Petitioner and denying that she was ever at the Headquarters as on the alleged day of 4.12.2015 and that she had been on leave from 23rd November to 8th December 2015 and so could not have threatened the Human Resource & Development Manager as alleged.

63. On 11.12.2015, the Petitioner was again suspended from duty for 3 months pending further disciplinary action. She was also not to be paid any salary during the period of suspension. She was thereafter summoned to appear before the disciplinary committee.

64. On 8.1.2016 the Respondent, aver that she was invited to appear before a disciplinary committee meeting on Thursday 28th January 2016 at 10 am.

65. The Petitioner contends that she had been called by one Cynthia from Kisumu office informing her she should pick a letter from Headquarters. On 15.1.2015, she went to the NGO's Coordination Board Headquarters and was barred from entering the premises. She avers that she was also barred from accessing office email from 5th December 2015.

66. The Petitioner however decided not to appear before the disciplinary committee as she was of the view that a decision to dismiss her had already been made and she could not get any fair hearing.

67. She contends that the decision to dismiss her was a reaction to her decision to file a Petition together with her Co-Petitioner challenging the qualifications of the 1st Respondent.

68. On 22.2.2016, the Petitioner was dismissed from duty on account of gross misconduct.

69. It is worth noting that on 4.2.2016, the Petitioner had filed this Petition challenging amongst other issues the qualifications of the 1st Respondent as Executive Director. I have already made a finding on the issue in this Judgment and will not belabour the same.

70. That being the position, it is more probable than not that there was already bad blood between the Petitioner and the 1st Respondent. The Petition was already pending in Court at the time. She was expected to appear before a disciplinary hearing on 25.1.2016. At the time, she avers that she had already been barred from accessing the office and stopped from receiving office emails.

71. The dismissal letter indicated that the Petitioner was dismissed for insulting and issuing threats to assault the Human Resource & Development Manager. The letter indicated that after she failed to appear before the disciplinary committee and the committee nevertheless sat and deliberated on the charges against her and interviewed witnesses present during the incident and was satisfied she violated Section 44(4) of Employment Act and was therefore dismissed.

72. She was informed she could Appeal the decision to the Executive Director in 14 days. The omission in the entire disciplinary process is that the Executive Director who had been sued by the Petitioner is the one who sat in the Board to determinate the case against the Petitioner. He was also the person to be appealed to. The Petitioner had raised her reservations about the entire disciplinary process which the 2nd Respondent seems to have ignored.

73. The 1st Respondent in the dismissal letter indicated the Board sat and decided to dismiss her. The minutes of the disciplinary hearing were however not brought to the Court's attention and it is therefore not easy to discern who sat on the committee if at all and what evidence if any was adduced against the Petitioner.

74. In the circumstances and in view of the fact that the 1st Respondent sat and became judge in his own cause makes the entire disciplinary a sham and unfair and unjustified.

75. Section 45(2) of Employment Act 2007 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".

76. It is apparent that the disciplinary process meted against the Petitioner lacked transparency and fairness and I therefore find the dismissal of the Petitioner unfair and unjustified.

77. In relation to remedies I declare that the 1st Respondent served as Executive Director without proper academic qualifications and in breach of Article 10 of the Constitution and the 2nd Respondent are liable for employing him without due diligence.

78. I also award the Petitioner compensation as follows:-

1. 1 month salary in lieu of notice = 86,000/=

2. 8 months salary as compensation for unlawful dismissal = 8 x 86,000 = 688,000/=

TOTAL = 774,000

3. Any terminal dues to be agreed upon on be assessed by the Court.

4. The 2nd Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this Judgement.

Dated and delivered in open Court this 7th day of May, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kashindi for 1st and 2nd Respondent – Present

No appearance for Petitioner