



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**Petition No. 140 Of 2016**

(Before Hon. Justice Hellen S. Wasilwa on 17<sup>th</sup> September, 2019)

**JOSEPH NYANDIKO NYANCHAMA .....PETITIONER**

**VERSUS**

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

**JUDGMENT**

1. The Petitioner herein through the firm of Okoth & Company Advocates filed an Amended Petition Amended on 27<sup>th</sup> February, 2017 and filed in Court on the same day. In which Petition he seeks the following reliefs as against the Respondent herein:

- a. A declaration that the acts and letters of the Respondent complained of above were unlawful and infringe 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. An Order of certiorari to bring to this Honourable Court to quash the decision of the Respondent contained in the letter of termination dated 11<sup>th</sup> November, 2016.
- d. Upon grant of prayer b) and c) 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 loss of benefits.
- e. 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 generalized allegations against the Petitioner
- f. 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.
- g. 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 58 at Embakasi staff quarters during the subsistence of the Petitioner's employment.
- 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 to the Petitioner.
- i. A declaration that the Respondent's Disciplinary Committee as constituted to purportedly hear the Petitioner was and is still illegal and lacked jurisdiction to hear the Petitioner.
- j. Compensation for unlawful and wrongful suspension and termination.
- k. A declaration that the termination letter dated 11<sup>th</sup> November, 2016 is null and void ab initio.

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

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

**n. Costs of the Petition.**

### **Facts**

2. The Petitioner in this matter was employed by the Respondent, a State Corporation with the responsibility of transporting, storing and developing petroleum products to consumers of Kenya, as an Accounts Assistant III on 21<sup>st</sup> January, 1999. The Petitioner contends that he performed his duties diligently and to the Respondent's satisfaction and which resulted in his promotion to the position of Senior Internal Auditor, Job Group 4.

3. The Petitioner avers that he was involved in a review of an audit, which audit revealed lapses within the Respondent company that bordered on fraud and that following the audit the Respondent became hostile to the Petitioner even going to an extent of advertising the Petitioner's position in the Daily Nation on the Month of 22<sup>nd</sup> April 2016 while the Petitioner was still under its employment and on annual leave.

4. The Petitioner further avers that when he resumed duties he was denied access to his office on 6<sup>th</sup> May, 2016 and instead received a letter at noon signed by the Human Resource Manager dated 4<sup>th</sup> May, 2016 purportedly sending the Petitioner on suspension on purported allegations of contributing in leakage of sensitive information on tenders to external parties.

5. The Petitioner contends that his suspension was subject to him receiving half salary, a fate that he did suffer until he learnt of his termination on 1<sup>st</sup> December, 2016 after he received a letter dated 11<sup>th</sup> November, 2016 by registered post.

6. The Petitioner contends that the reasons for his suspension and subsequent termination were baseless and were only meant to harass and intimidate him and contrary to the Staff Rules and Regulations as the same provided that suspension could only be for a maximum period of six months with full pay.

7. The Petitioner further contends that the decision to suspend him was not based on any Staff Rules and Regulations but rather was an action ultra vires the powers of the Respondent. He further insists that this decision was made arbitrarily by the Respondent to punish him without due regard to process.

8. The Petitioner avers that Respondent's breach of the Company Rules and Regulations was in contravention of the Employment Act, the Fair Administrative Actions Act and the Constitution of Kenya, 2010.

9. The Petitioner confirmed having received a letter to show cause from the Respondent herein dated 6<sup>th</sup> July, 2016 on 11<sup>th</sup> July, 2016 requiring him to respond to the same within 48 hrs, which he (the Petitioner) termed as unfair Labour Practice. The Petitioner did however heed to the timelines as requested by the respondent despite not having enough time and access to relevant documentation in the Respondent's custody to respond to the show cause letter.

10. The Petitioner avers that he was invited by a disciplinary hearing that was to be held on 9<sup>th</sup> August, 2016, vide the Respondent's letter dated 4<sup>th</sup> August, 2016. He further avers that he did appear at the staff disciplinary hearing as per the invite in the company of Major (Rtd) Isaac Ondari, whose presence the committee protested compelling him (the Petitioner) to appear unaccompanied, a condition the petitioner termed as unfair and illegal.

11. The Petitioner further avers that the Disciplinary process was conducted unfairly and contravened the provisions of Article 47 of the Constitution and the provisions of the Fair Administrative Actions Act. He further avers that Article 47 was breached by the Respondent when it failed to accord him (the Petitioner) a hearing before suspending him and further that the manner in which the disciplinary hearing was conducted was unfair and unjust.

12. The Petitioner contends that the Respondent in complete disregard to the provisions of Article 26 of the Constitution of Kenya, 2010 hired goons to harass and intimidate the Petitioner at his residence on 11<sup>th</sup> November, 2016 at 9.10 pm and the matter was reported to Embakasi Police Station vide OB 91/11/11/2016.

13. The Petitioner further contends that he was denied his right to fair hearing before an independent and impartial tribunal or body as envisaged in Article 50 of the Constitution of Kenya, 2010, in the manner in which the Respondent's Staff Disciplinary Committee conducted his hearing. The Petitioner insists that the acts, decision and omissions by the Respondent contravenes Articles 10, 24, 27, 28, 35, 43, 47, 50, and 73 of the Constitution of Kenya, 2010.

14. In Response, the Respondent filed a Replying Affidavit dated 28<sup>th</sup> August, 2018 deposed to by JOE SANG, the Managing Director of Kenya Pipeline Company Limited, the Respondent herein in which it is admitted that the Petitioner was employed by the Respondent as an Accounts Assistant III and was subsequently promoted to Senior Internal Auditor.

15. The Respondent further contends that the Petitioner's employment was subject to his letter of Appointment dated 30<sup>th</sup> September, 2010 and the Respondent's Staff Rules and Regulations, 2015.

16. The Respondent avers that it did conduct its own investigation and found that the Petitioner irregularly provided information on the Respondent's tenders for supply prompting the Respondent to suspend the Petitioner in line with Clause 8.3.4 of the Respondent's Staff Rules and Regulations, 2015 and that the Petitioner was informed of the same vide the Respondent's letter dated 4<sup>th</sup> May, 2016.

17. The Respondent further avers that during the period of his suspension, the Petitioner was to keep off the Respondent's premises and was to be paid half his salary and full benefits as provided under Clause 8.3.4 of the Staff Rules and Regulations.

18. It was further the Respondent's contention that the Petitioner's actions and/or omissions amounted to gross misconduct and are contrary to the provisions of Clauses 2.8.1.9, 2.8.1.10 and 8.5.5 of the Respondent's Staff Rules and Regulations.

19. The Respondent contends that the Petitioner was requested vide its letter dated 6<sup>th</sup> July, 2016 to show cause why disciplinary action should not be taken against him for gross misconduct and that the Petitioner was subsequently invited for a hearing before the Staff Disciplinary Committee.

20. It is the Respondent's contention that the petitioner was accorded a fair hearing and was also granted ample time to respond to the Notice to Show Cause contrary to his averments in the Petition.

21. The Respondent further contends that the decision to terminate the Petitioner 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.

22. The Respondent states that the publication of the Petitioner's suspension in print and electronic media is the subject of the proceedings in Milimani HCCC No. 233 of 2016 and ought not to be the subject of these proceedings.

23. The Respondent further contended that the Respondent has allocated the Petitioner house number 58 at Embakasi Staff Quarters by virtue of his employment with the Respondent and therefore the Petitioner has no justifiable ground for continuing to occupy the same.

24. The Respondent insists that it has never threatened or attacked the Petitioner in any way as alleged in the Petition filed herein.

25. In conclusion, the Respondent urged this Honourable Court to dismiss the Petition as filled with costs.

26. Parties thereafter agreed to canvass the Petition by way of written submissions.

#### **Petitioner's Submissions.**

27. The Petitioner submitted that the act of the Respondent proceeding to advertise his post while he was still under the Respondent's employment and on annual leave was unfair and unlawful and was done contrary to the provisions of Section 41 of the Employment Act. Further that this act was in complete breach of the rules of natural justice.

28. The Petitioner further submitted that his suspension was equally unfair, unlawful, and contrary to the provisions of Article 47 of the Constitution of Kenya, 2010, the Fair Administrative Actions Act on fair administrative action as well as Section 41 of the Employment Act.

29. The Petitioner further contends that his suspension was based on initial investigations which investigations were not exposed to him and as such termed as unfair. For emphasis on the issue, the Petitioner cited and relied on the Authority of **Ezekiel Nyangoya Okemwa Vs Kenya Marine & Fisheries Research Institute (2016) eKLR** where it was held:-

**“The dream team did not involve the Claimant in the investigations which followed his suspension. Suspension itself was based on rumours. The Claimant was not availed a statement of offence, and called upon to show cause. He was not invited to any forum to exculpate himself. He was not heard.”**

30. The Petitioner contended that it was unlawful, unfair and unjust Labour practice for the Respondent to demand that he responds to the same within 48 hours and further that he had to respond to the same without being furnished with the requisite information in the Respondent's custody.

31. The Petitioner further contends that his termination from the Respondent's employment was unfair as the Respondent failed to follow provisions for fair termination as provided under Section 41 of the Employment Act, which provides that an employer must first explain to an employee the reasons for the termination and then hear and consider any mitigation from the employee in the event there is any behaviour complained of before proceeding to terminate the employee. To fortify this argument the Petitioner cited and relied on the Authority of **Mary Chemweno Kiptui Vs Kenya Pipeline Company Limited (2014) eKLR** for emphasis.

32. The Petitioner went on to state that the disciplinary hearing as constituted and conducted was a kangaroo Court as it failed to furnish him with the necessary materials for him to prepare a proper defence.

33. He further contended that no evidence whatsoever was presented at the hearing to support the Respondent's allegations. He avers that he was presumed guilty contrary to the provisions of the constitution where one is presumed innocent until the contrary is prove.

34. The Petitioner submitted that he was not given adequate time to mount a probable defence for himself making the entire process unfair and unlawful. For emphasis the Petitioner cited the case of **David Wanjau Muhoro Vs Ol Pejeta Ranching Limited (2014) eKLR** where

the *Court held*:-

**“The principle of fair hearing requires the employee has sufficient opportunity to prepare. This entails:’**

- i. The right to sufficient time to prepare. Time however, was not the totality of sufficiency of opportunity.**
- ii. The right to fully understand the charges. General charges such as dishonesty, fraud and fraudulent activities were vague and offered the employee no opportunity to respond intelligibly, or at all.**
- iii. The right to documentation. The employee needed to be given the documents the employee requests for.”**

35. Flowing from the above the Petitioner contended that in his case he was not accorded any of the above thus terming his termination as unfair. The Petitioner further submitted that the Respondent failed to comply with the provisions of Section 43 of the Employment Act as they failed to prove reasons for termination of the Petitioner.

36. In conclusion, the Petitioner submitted that he is entitled to the reliefs as sought in his Petition having shown that his termination was indeed unfair and he urged the Court to allow the same as drawn.

37. In his Supplementary Submissions the Petitioner referred this Honourable Court to the decisions in the following cases:-

**i. Petition No. 139 of 2016 Francis Titus Mwendwa Vs Kenya Pipeline Company Limited.**

**ii. Petition No. 141 of 2016 Major Rtd Isaac Matti Ondari Vs Kenya Pipeline Company Limited**

38. The above two cases share similar facts as his case and in both, the Court found in favour of the Petitioners therein. The Petitioner therefore urged this Court to be guided by the same.

39. The Petitioner further contends that the Respondent had a predetermined mind to terminate his services as evidenced by the fact that the Respondent went on to advertise his position while he was still under the Respondent’s employment.

#### **Respondent’s Submissions.**

40. The Respondent submitted that the termination of the Petitioner was based on a fair and valid reason as provided under Sections 43 and 45 of the Employment Act, 2007 and that the reason was in relation to the employee’s conduct, capacity or compatibility.

41. The Respondent further submitted that the said termination was done in accordance with its Staff Rules and Regulations more specifically Rules 2.8.1.7, 2.8.1.10 and that the Petitioner’s actions of disclosing confidential information which became known to him by virtue of his position at the Respondent company to third parties was a ground for summary dismissal by dint of Rule 8.5.5 of the Staff Rules and Regulations.

42. The Respondent further submitted that the Petitioner’s summary dismissal was procedural and in accordance with the provisions of Section 44 of the Employment Act as well as the Respondent’s staff Rules and Regulation, which provided for grounds for summary dismissal.

43. The Respondent further contended that the Petitioner owed it a legal duty to ensure that all confidential materials and information provided for use by the Audit team was protected from being accessed by unauthorised third parties.

44. The Respondent averred that the subsequent leakage of this information was proof that the Petitioner had failed in his duties and that resulted in the Respondent losing confidence in the Petitioner. To fortify this the Respondent cited and relied on the case of **Judicial Service Commission Vs Gladys Boss Shollei & Another** where Kiage, JA adopted the test laid down in the Canadian Supreme Court in **Mc Kinley Vs B.C. TEL (2001) 2 S.C.R 161** on the standard to be employed in determining whether an employees’ conduct would give rise to just cause for dismissal. The Court stated as follows:-

**“Whether an employer is justified in dismissing an employee on the ground of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically the test is whether the employee’s dishonesty gave rise to a breakdown in the employment relationship. The test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee’s obligations to his or her employer.”**

45. It is the Respondent’s submission that the Petitioner being the supervisor to the Audit team he owed the Respondent the duty to ensure the information obtained as a result of the Audit was kept confidential, which duty he failed. For emphasis the Respondent cited and relied on the Authority of **Miriam Siwa Vs Kenya Post Office Savings Bank Limited (2014) eKLR.**

46. The Respondent contends that the Petitioner’s termination was conducted in a just, fair and equitable manner and that the procedure followed was within the confines of the law more specifically Rule 8.3.4 of its Staff Rules and Regulation.

47. It is further the Respondent's submission that there was no bias in the manner in which the disciplinary hearing was conducted as alleged by the Petitioner. For emphasis the Respondent relied on the Court's findings in the Court of Appeal decision in the case of **Attorney General Vs Anyang' Nyong'o & Others (2007) 1 E. A 12.**

48. It is further the Respondent's submission that the Petitioner was found to have violated Rules 8.5.5, 2.8.1.9 and 2.8.1.10 which relate to mishandling of company information and therefore his summary dismissal was justified.

49. The Respondent contended that the Petitioner has failed to prove that his termination was unfair and unlawful and therefore urged this Court to dismiss the instant Petition with costs to the Respondent. For emphasis the Respondent relied on the decision in the case of **Jackson Butiya Vs Eastern Produce Cause No. 335 of 2011** where it was held:-

**“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer. It is my finding that the Claimant has not proved that he did not get a fair hearing at his disciplinary hearing. From the foregoing I find that there was a valid reason to dismiss the Claimant and he was subjected to a fair hearing of his disciplinary case.”**

50. The Respondent submitted that the Petitioner is not entitled to the reliefs sought in his Amended petition and urged this Honourable Court to dismiss the same with costs to the Respondent. For emphasis, the Respondent cited and relied on the Court findings in the cases of **Nampak Corrugated Wadeville Vs Khoza (JA14/98)(1998) ZALAC 24, Kenya Airways Limited Vs Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR, Kenya Airways Limited Vs Alex Wanaina Mbugua, Civil Appeal No. 107 of 2018 and Kenya Revenue Authority Vs Menginya Salim Murgani (2010) eKLR.**

51. I have examined all the evidence and submissions of both Parties. In the context of this case, the issues for determination are as follows:-

- 1. Whether the Respondent had valid reasons to warrant dismissal of the Petitioner.**
- 2. Whether the Petitioner was given due process before the dismissal.**
- 3. Whether the Petitioner is entitled to remedies sought.**

#### **Reasons for dismissal**

52. The Petitioner was dismissed vide a letter dated 11<sup>th</sup> November 2016 which indicates that he had been found guilty of the offence as charged as being in breach of Clause 8.5.5, 2.8, 1.9 and 2.8.1.10 of the Staff Rules and Regulations and had subsequently been summarily dismissed.

53. Prior to this dismissal, the Claimant indicated that he supervised auditors including one Francis Titus Mwendwa in the early months of 2016 and found various lapses bordering on fraud. He forwarded the report to relevant authorities and proceeded on leave in April 2016. While on leave, he noticed an advertisement placed by the Respondent advertising for his post as being vacant.

54. He resumed back in May 2016 and made enquiries about the advertisement but got no satisfactory answer.

55. He was issued with a suspension letter dated 4.5.2016 on 6.5.2012 which indicated that “initial investigations have pointed that you have contributed to the provision of this information to external parties in an unauthorised manner”.

56. He was then served with a letter of show cause to explain why disciplinary action should not be visited against him. He was given 48 hours to respond. He wrote to the Respondents an email on 12.7.2016 at 3.39 requiring that they extend time within which to respond.

57. He also requested them to furnish him with a copy of Staff Rules and Regulations plus a copy of the investigation report to enable him respond to allegations contained in the letter (Appendix JNN 13).

58. He nevertheless responded to the show cause on 13.7.2016 (appendix JNN 14) denying allegations against him. He thereafter attended a disciplinary hearing in August 2016 before dismissal on 11.11.2016.

59. The Petitioner is alleged to have leaked out information to external parties in an unauthorised manner. The Petitioner's dismissal is also based on what Respondents aver is breach of their Staff Rules 8.2.1.7 which deals with handling official matters confidentially.

60. Under rule 8.5.5, mishandling of official communication is considered a gross misconduct.

61. From the letter of suspension and dismissal, the Claimant was suspected to have contributed to leakage of confidential company information to external parties and particularly to a blogger by the name Cyprian Nyakundi who published it on 13<sup>th</sup> March 2016.

62. The Respondent seems to be of the view that the Petitioner contributed to the leakage as he was supervising the auditing of the material sector. The fact that the Petitioner was supervising the auditors does not mean that he was responsible for the leakage. The Petitioner indeed stated that he was not the author of the audit but only reviewed them.

63. The Respondents did not explain why they thought the Petitioner leaked information to external forces but only seem to pin him down because he was an audit supervisor. This in my view falls below the standard expected to prove an allegation of this magnitude. The Respondent should have gone further to show proof that the Petitioner was in charge of the leaked information and show how he released it to the alleged blogger to warrant the allegations. Suspicion alone cannot do.

#### **Due process**

64. On the issue of due process, the Claimant was indeed invited to a disciplinary hearing in August 2016 before dismissal on 11<sup>th</sup> November 2016. However prior to the suspension, the Respondent had placed an advert to fill up the position occupied by the Petitioner whereas the Petitioner was lawfully still the holder of the office.

65. This is prima facie evident that the Respondent was determined to edge out the Petitioner from office even before subjecting him to any disciplinary process.

66. The Petitioner was issued with a show cause letter and asked to respond within 48 hours. He wrote an email to the Respondent's Human Resource asking for extension of time within which to respond and requested for further information and copy of the investigation report. The Respondent did not respond to his request.

67. From the onset therefore, the Respondent breached the Petitioner's right to a fair hearing, which include the right for sufficient time to prepare and to be given the necessary documents and materials to prepare for his case as envisaged under Articles 47 and 50 of the Constitution.

68. Under Section 4(3) (a) and (g) of the Fair Administrative Actions Act also states as follows:-

**3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision:-**

**a. prior and adequate notice of the nature and reasons for the proposed administrative action;**

**g. information, materials and evidence to be relied upon in making the decision or taking the administrative action”.**

69. In the scenario provided above, the Petitioner was denied adequate time to respond to allegations against him and adequate material to prepare for the case. Despite a disciplinary hearing being conducted, the Respondent's action/omission negated a proper disciplinary action which is free and fair and therefore this Court finds that the Petitioner was not accorded a fair hearing.

70. From the foregoing analysis, this Court finds the termination of the Petitioner unfair and unjustified and in breach of the Petitioner's rights to a fair hearing under Article 47 and 50(1) of the Constitution and Article 41 of the Constitution in breach of fair labour practices.

71. In the circumstances, I find the Petitioner has established his claim against the Respondent and I find the only remedy that would adequately compensate the Petitioner is reinstatement, which I proceed to do with back pay with effect from the time of suspension.

72. The Respondent will pay costs of this Petition and interest with effect from the time of this judgement.

**Dated and delivered in open Court this 17<sup>th</sup> day of September, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Okoth for Petitioner – Present

Respondents – Absent