



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 73 OF 2019

IN THE MATTER OF ARTICLES 10, 22, 23, 41, 47, 48, 50, 159, 232, 236, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF SECTIONS 11, 12, 14, 35, 36, 41, 43, 44, 45, 47 AND 49 OF THE EMPLOYMENT ACT NO.11 OF 2007

IN THE MATTER OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT NO. 20 OF 2011

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO.4 OF 2015

IN THE MATTER OF A PETITION FOR PROTECTION OF THE PETITIONER'S RIGHT TO FAIR LABOUR PRACTICES AND FAIR ADMINISTRATIVE ACTION

-BETWEEN-

LAWRENCE M. BOKORO.....PETITIONER

-VERSUS-

THE SOUTH EASTERN KENYA UNIVERSITY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 19th December, 2019)

JUDGMENT

The claimant filed the petition on 30.04.2019 through Mwangambo & Okonjo Advocates. The petitioner prayed for judgment against the respondent for:

- a) A declaration to be issued that the summary Dismissal was a violation of the petitioner's constitutional rights to fair hearing, fair labour practices and fair administrative action as enshrined in Article 41, 47 and 50 of the Constitution of Kenya, 2010.
- b) An order be issued expunging and cancelling the summary dismissal letter dated 09.04.2019.
- c) An order of injunction be issued restraining the respondent either by themselves, employees, servants or agents from terminating the employment of the petitioner as the termination is unlawful and irreparable harm will be caused to the applicant and interfere with his rights under the Article 41, 47 and 50 of the Constitution.
- d) An order of injunction be issued restraining the respondent either by themselves, employees, servants or agents from employing replacement labour or employment in the same position to perform the same or similar work as the applicant.
- e) Any further orders that the Honourable Court shall deem just and fit to grant in the circumstances, to protect the petitioner's constitutional entitlement to the fullest enjoyment of his rights to fair hearing, fair labour practices and fair administrative actions.

The petition is supported by the petitioner's annexed supporting affidavit and his further affidavit filed on 14.11.2019.

The respondent opposed the petition by filing on 13.05.2019 the replying affidavit of Professor Geoffery M. Muluvi, the respondent's Vice Chancellor through E.K Mutua & Company Advocates. The respondent filed further the Vice Chancellor's further affidavit on 16.07.2019 and a supplementary affidavit on 17.09.2019.

The parties agreed to have the petition determined on the basis of the affidavits and the final submissions that were filed for the parties.

The circumstances and facts of the case are as follows. There is no dispute that the respondent openly advised a vacancy and competitively employed the petitioner to the position of Finance officer. The appointment flew from the advertisement in the print media which closed on 18.07.2013 and interviews held on 23.10.2013. The petitioner indicated in his application and statement of capability that he had previously served as the Acting Managing Director of Agricultural Finance Corporation. At the interview for the job the respondent asked the petitioner the reason for separation with the corporation and he stated that he had resigned due to personal reasons. In that regard he exhibited a letter dated 10.11.2010 on acceptance of his resignation. It is the respondent's case that the petitioner failed to disclose that he had been charged in Criminal Case No. 1311 of 2012 in the Chief Magistrate's Court, Milimani with the alleged offences of conspiracy to defraud contrary to section 317 of the Penal Code, stealing by a person employed in the public service contrary to section 280 of the Penal Code, fraudulent false accounting contrary to section 330(b) of the Penal Code, and neglect of official duty contrary to section 128 of the Penal Code as read with section 36 of the Penal Code. The alleged offences were with respect to alleged petitioner's culpabilities while he was in employment of the corporation.

It is the respondent's case that in ignorance of the pending criminal case against the petitioner, the respondent employed the petitioner to the position of Finance Officer by the letter dated 14.11.2013.

In late 2017 the President made a directive that all Finance Officers and Procurement Officers should step aside pending a lifestyle audit to be carried out. By a letter dated 23.10.2018 Ref. No. MOF/CONF/29/03/"d"/(119) the National Treasury wrote to the Principal Secretary, University Education and Research outlining the list of officers who had been successful after the vetting exercise and the petitioner's name was missing. The respondent's investigations revealed that the petitioner's name was missing from the list in view of the pending criminal case.

Thus the respondent by the letter dated 27.11.2018 asked the petitioner to explain in 7 days why he had never disclosed the fact of the pending criminal case at the application, interview and after appointment stages to the position of Finance Officer for the respondent. By the letter dated 18.01.2019 the respondent reviewed the timelines for the claimant to submit his response because the petitioner complained that he had not received the earlier letter to explain. The petitioner then responded by his letter of 20.01.2019 stating that he had no duty to make the disclosure under the respondent's procedures, he had no intention to not to disclose, there was no provision for a mechanism to disclose, the criminal charges were vexatious and malicious and the matter did not warrant a disciplinary action. The respondent was dissatisfied with the response and the petitioner was subjected to a hearing before Senior Staff Disciplinary Committee held on 27.02.2019. The petitioner appeared before the Committee as was scheduled and he relied on his written response. He did not apply to the Committee to seek more information or documents. The Committee sought the advice of the Attorney General in the matter and the Solicitor General replied that the respondent was proceeding in accordance with the law. On 27.03.2019 the Committee recommended that the petitioner is dismissed from employment. The decision was conveyed to the petitioner by the letter dated 09.04.2019.

The petitioner appealed against the dismissal and asked for some documents to assist him at the appeal stage as per his letter dated 22.04.2019. The appeal had not been considered and determined by the date the petitioner filed the present petition on 30.04.2019.

The Court directed the respondent to consider the administrative appeal. The respondent's case is that the petitioner was provided the information he had requested for and the appeal was determined as the dismissal was upheld.

The petitioner's case is that he had been undergoing vetting as per the Presidential directive and it was unfair for the respondent to proceed in the manner it was done. Further, officers junior to the petitioner had sat as members of the Committee and the Committee did not give the petitioner an opportunity to appear accompanied by a colleague of his choice per section 41 of the Employment Act, 2007. Further the applicant's code of conduct had not been given to the petitioner to read and sign prior to the allegations. The petitioner alleges his rights have been violated as protected in Articles 41, 47, and 50 of the Constitution.

The respondent's case is that the petitioner as a public officer as defined under Article 260 of the Constitution was bound by the relevant constitutional and statutory provisions. In particular he was bound by Article 10 on the principles of good governance, integrity transparency and accountability; to act professionally per section 9 of the Public Officer Ethics Act and section 19 thereof to not knowingly give false or misleading information to members of the public or to any other public officer; regulation 5 of the Code of Conduct and Ethics for Public Universities, 2003 on honest and impeccable manner of carrying out private affairs and official duty, regulation 13 on duty to disclose where one is charged with a serious offence under the Penal Code (Cap 63) or any other law where a prison sentence may be imposed other than default of a fine.

The Court has considered the parties' respective positions and the material on record. The only issue for determination is whether the petitioner has established the alleged violation of rights as pleaded.

First, the Court returns that the duty to disclose as was levelled against the petitioner and particularly after he had been given the appointment as a Finance Office (and therefore became a public officer in the respondent's employment) was prescribed in the cited constitutional, statutory, and subsidiary legislation (regulations) as cited for the respondent. The petitioner was bound by the law as cited and with or without the respondent's Code of Conduct and Ethics being given to the petitioner or not, he was bound by the law accordingly. The Court reckons that the Code was a subsidiary legislation under the Public Officer Ethics Act, 2003 and the claimant was bound to disclose the pending criminal case in line with the provisions of the Code.

Second, the Court has considered the claimant's concerns relating to junior officers sitting at the Committee and his not being accompanied by a colleague of his choice or even being accessed relevant information to assist towards his exculpation. The Court has considered that any such irregularities were cured by the appeal process and which the petitioner has not complained about in the like manner he had sought to challenge the Committee process.

Third, it is clear that the petitioner was given a show-cause letter, he responded, the hearing was undertaken and subsequently his appeal was considered and determined. Reasons for the dismissal were conveyed to him. The Court finds that the petitioner was accorded due process so that a case for violation of Articles 41, 47 and 50 as was alleged has not been established. The Court further finds that the petitioner has not

established that the vetting as per the Presidential directive operated as a bar or suspension or adjournment of the disciplinary process commenced against him by the respondent. Thus the Court finds that the disciplinary process did not therefore amount to an abuse of due process or fairness or double jeopardy in the circumstances. While making that finding, the Court finds that in any event the petitioner has exhibited on his further affidavit filed on 14.11.2019 the letter dated 07.06.2019 by the Principal Secretary, National Treasury listing the petitioner as cleared while at the same time stating thus, “**However, officers who are charged in court, undergoing investigations or disciplinary process should not be reinstated until the matter is concluded**” Thus the Court returns that the listing of the petitioner’s name in that letter did not therefore aid the petitioner’s case in the present petition.

Fourth, the petitioner has not established his allegations for breach of the cited provisions of the Bill of Rights and the petition will fail. Further the injunctions styled as “**retraining**” will not issue even if it meant “**restraining**” as they are not justified. In particular the Court cannot restrain that which has already happened, the dismissal or termination which has materialized and the Court considers nothing is left subject of a restraining injunction as purportedly prayed for. The petitioner made no prayer on costs and the respondent has not made submissions in that regard. In the circumstances there will be no orders on costs.

In conclusion judgment is hereby entered for the respondent against the petitioner for dismissal of the petition with no orders on costs.

Signed, dated and delivered in court at Nairobi this Thursday, 19th December, 2019.

BYRAM ONGAYA

JUDGE