



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 97 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 18th June, 2018)

SIMON N. MWANIKI1ST PETITIONER
CATHERINE IGOKI MBOGO2ND PETITIONER
MARY CORET OLOO3RD PETITIONER
BERNARD MWENGESI4TH PETITIONER
BRITA DEWA MOLO.....5TH PETITIONER
VERONICA MWAMBOGA6TH PETITIONER
JANEROSE KIMATHI.....7TH PETITIONER
HARRISON K. MAINA8TH PETITIONER
DOROTH MUKUI9TH PETITIONER
PATRICK LUGANDIRU.....10TH PETITIONER
ANTHONY NYAGA.....11TH PETITIONER
FAITH MUGAMBI12TH PETITIONER
EVANS MASIGA13TH PETITIONER
MACKLINE OSEBE14TH PETITIONER
BERNARD LUBIA LUVANDALE.....15TH PETITIONER
GEORGE K. MUNGAL.....16TH PETITIONER
RAPHAEL KILALA17TH PETITIONER
JOEL OPANA NJURA18TH PETITIONER
CRISPUS M. MURAGURI.....19TH PETITIONER
FRANCIS KAMAU20TH PETITIONER

BENSON NYOIKE21ST PETITIONER
GODFREY GICHERU MUCHINA.....22ND PETITIONER
SLYVIA A. ONYANGO23RD PETITIONER
CAROLINE NJERI24TH PETITIONER
LONAH MUKU GECEMBA.....25TH PETITIONER
WAMBUA MUNYASA MATIVO.....26TH PETITIONER

VERSUS

PERMANENT SECRETARY

MINISTRY OF DEFENCE1ST RESPONDENT

DG NATIONAL INDUSTRIAL

TRAINING AUTHORITY.....2ND RESPONDENT

PUBLIC SERVICE COMMISSION.....3RD RESPONDENT

THE HON. ATTORNEY.....4TH RESPONDENT

JUDGEMENT

1. The Petitioners filed suit on 11th December 2015 through the firm of Gitobu Imanyara & Co. Advocates which Petition was amended on 28th December 2016 seeking damages for unfairness, unlawfulness, illegality and violation of their rights and fundamental freedoms.
2. The Petitioners aver that they were all civilian personnel employed by the Ministry of Defence in various capacities and over long periods of time after they underwent the requisite training with the National Industrial Training Institute (NITA).
3. They aver that they were trained to serve in various capacities either as motor vehicle mechanics, carpenters, dressmakers, masons, tailors, panel beaters and spray painters after passing the examination set by NITA.
4. They further aver that sometimes in the year 2013, the 1st Respondent instructed all members of the civilian personnel to submit their certificates that had been issued by the 2nd Respondent for verification which the Petitioners complied with and submitted their original certificates. On diverse dates between the 19th and 21st November 2013, the 1st Respondent authored letters to the Petitioners informing them that the certificates which they had submitted were found to be fake. A notice to show cause why disciplinary proceedings should not be instituted against them was served upon them.
5. They state that the 2nd Respondent retained their original certificates and on diverse dates between the 11th and 13th February 2014, the 1st Respondent authored letters referenced 'Gross Misconduct/Interdiction' to the Petitioners informing them that they had been interdicted from exercising the duties of their office pending the finalization of their cases. They were placed on half pay and ordered not to leave their duty stations without the express permission of their immediate supervisors and also informed that the Ministry of Defence was contemplating dismissing them from the service on account of gross misconduct.
6. They further state that during the interdiction period, they were placed on half pay and their commuter allowance was withheld, subjecting them to dire financial constraints and hardships and owing to the unlawful and illegal interdiction, they lost income, hence appealed against the decisions as directed by sending their appeals for which they still await the decision of the Respondents which culminated in the demotion and/or dismissal of the Petitioners.
7. They aver that the 10th, 20th and 22nd Petitioners through letters dated 10th February 2016 and 9th September 2015 respectively, were informed of their dismissal and they did not receive their annual leave allowances for two years.
8. The 1st - 9th, 11th - 19th, 21st, 23rd and 26th Petitioners then received letters authored on diverse dates between 23rd March 2015 and 12th May 2015 informing them that their interdiction had been lifted but they would still face various disciplinary actions as recommended by the Ministerial Human Resource Management Advisory Committee (MHRMAC). Such disciplinary actions included demotion from their job groups to lower job groups and the monthly deductions from their salary being overpayments and other allowance erroneously paid as well as being reprimanded and warned that a repeat of the same or similar mistake would lead to their dismissal from service.
9. They contend that they have continued being given a lower pay and have all been subjected to illegal monthly deductions of Kshs. 2,000

each, which actions they deem to be highly unfair, unlawful, illegal and un-procedural amounting to a violation of their rights and fundamental freedoms enshrined in the constitution of Kenya 2010.

10. They contend that they were never offered a chance to produce evidence of their qualifications. The 16th and 21st Respondents aver that they have already proceeded on retirement and are bound to receive lower pensions.

11. They further aver that vide letters authored on diverse dates being 9th September 2015, 10th February 2016 and 21st July 2016, the 10th, 20th, 22nd, 24th and 25th Respondent received letter authored by Dr. Mary K. Osoro, PhD, on behalf of the 1st Respondent informing them that they had been dismissed from service, which decision had been made by the Authorized officer on the advice of Ministerial Human Resource Management Committee with effect from 19th May 2003 on account of having submitted fake document on new appointments.

12. They were asked to pay back the overpayments and allowance overpayments received which they claim was done without any justifiable cause as they were not informed of the rationale which the Ministerial Human Resource Management Committee used to dismiss them from the service.

13. They state that the Respondents have massively violated their economic and social rights by subjecting them to a skewed and flawed disciplinary process where they were never invited to defend themselves, which is a blatant violation of their right to fair administrative action enshrined under Article 47 of the Constitution.

14. The Respondent filed their replying affidavit where they aver that on 10th September 2013, the 1st Respondent received communication on the verification exercise from the 2nd Respondent where they were reliably informed of the authenticity of most of the certificates of Ministry of Defence employees and informed them of the fraudulent act of forgery of certificates by some of the employees especially the Petitioners herein. The 2nd Respondent decided to retain the forged certificates.

15. They further aver that on diverse dates between November 2013 and March 2014, the Ministry of Defence issued notices to show cause with a 21 day timeline to each Petitioner found to have a fake certificate. They were placed on interdiction and half salary and asked to respond to the notice to show cause letters which they did not.

16. Their cases were submitted on 26th March 2014 to MHRMAC and upon hearing their cases, the committee recommended that the Petitioners who had been employed using legitimate certificates but presented forged certificates for purposes of getting promotions over the years have their interdiction lifted from the date their promotion started running and the same be substituted with a demotion to the appropriate grade and any overpayment be recovered besides the Petitioners being reprimanded.

17. The committee also decided that any employee who was found to have forged certificates for purposes of securing employment should be summarily dismissed for gross misconduct in line with Section 17(g) of the Employment Act for having committed a criminal offence.

18. They state that in line of the evidence, they believe that the Petitioners were at all times accorded a fair hearing and fair administrative action and there was no bias or arbitrariness in their interdiction and dismissal or demotion as the same was done in accordance with the service regulations.

19. They also believe that the Petitioners did not exhaust all remedies before seeking redress in court as none of the Petitioners wrote to the Secretary Public Service Commission (K) through the authorized officer expressing the dissatisfaction with the decision, nor did the petitioners forward the appeal to the Public Service Commission (K) (PSC) for decision.

20. They also state that the 1st Respondent denies breaching any of the Petitioners' constitutional rights and has at all times acted within the ambit of the law and that the Petitioners' claim of unfairness, illegality and un-procedural treatment in the disciplinary action taken is unjustified as the authentication of academic and professional certificates for persons holding a public office is mandatory to root out any public officers without a valid certificate.

Submissions

21. The Petitioners filed their submissions where they submit that for a suspension of an employee to be lawful, it must have either a contractual authority or statutory underpinning. They submit that the 1st Respondent interdicted them without making any reliance to contractual or statutory provisions between it and the Petitioners.

22. They aver that the 1st Respondent made no attempt to show where he derived the authority to interdict the Petitioners having not filed documents or contracts hence the 1st Respondent had no power to subject the Petitioners to disciplinary action and place them on interdiction. They were guided by the case of **Timon Otieno Mboga vs Kenya Forest Service, cause No. 2 of 2014 [2015] Eklr.**

23. They aver that the 1st Respondent has not provided any legal backing for the half pay of the Petitioners' salaries and even where the 1st Respondent made the half pay, it was only reasonable that the same be refunded to the Petitioners upon being found blameless as it was a legitimate expectation of the Petitioners. They relied on the case of **Peterson Ndung'u & 5 others Vs Kenya Power and Lighting Company Limited cause Number 1149 of 2011 [2014] eEklr.** It is thus the Petitioners' humble request that a declaration be made by this Court that they are entitled to the salary and any accruing allowances withheld from them during the interdiction.

24. They further aver that Section 10(5) of the Employment Act 2007 makes it mandatory for an employer to consult an employee where there is any change to the particulars of employment but the 1st, 9th, 11th, 19th, 21st, 23rd and 26th Petitioners were not consulted after being

demoted to a lower job group even after being found blameless by the MHRMAC hence the demotion was flawed and biased.

25. They submit that the termination of the 10th, 20th, 22nd, 24th and 25th Petitioners was unfair as they were never given an opportunity to be heard during the disciplinary proceedings which is against Section 41 of the Employment Act.

26. They state that they were subjected to various forms of discrimination from the time they were interdicted to the time when the 1st Respondent decided to either demote them or terminated their employment even when such form of discrimination has not been provided for specifically in the Constitution.

27. They submit that Article 27 of the Constitution as read with Article 259 (4) (b) of the Constitution imply the term 'includes' is open-ended so as to incorporate all forms of discrimination. Hence they ask the Court to find that the decision by the 1st Respondent to terminate or demote them was unlawful and the prayers sought in the Petition be granted.

28. The Respondent filed their submissions where they submit that it is trite law that when someone alleges the breach of a constitutional right, such person must prove such assertions. That it is not sufficient to simply state that the section breached without stating exactly how it was breached as the Petitioners have done in relation to Article 28 and 41 of the Constitution. This principle of particularity was settled by the court of appeal in the case of **Anarita Karimi Njeru Vs Republic (1976-80) 1 KLR 1272**; which they state has not been adhered to by the Petitioners.

29. They further submit that the interdiction of the Petitioners was lawful as they were placed under interdiction to enable the Respondent carry out their investigation after the Petitioners certificates were found to be fake.

30. Moreover, they aver that the Petitioners on the other hand have not referred to any specific provisions on interdiction that the Respondents failed to comply with or acted in contravention of. On the issue of half pay, they asked Court to look at the disciplinary process espoused by various commissions, which show that all employees on interdiction receive half pay. This was guided by the case of **Owaga Vs Trans Ocean (U) Ltd (1990) KLR**.

31. They aver that the termination of the 10th, 20th, 22nd, 24th and 25th Petitioners was fair as the Petitioners did not prove that the Respondent was acting in breach of the law and or employment contract. That it is trite in law that an employer has the legal right to subject his employees to disciplinary process provided that he does so having in mind the procedural safeguards erected by law.

32. The Respondents aver that the certificates presented were fake and that the Petitioners were therefore not acting in good faith when they applied for jobs using fake certificates. The Petitioners who were dismissed from service were informed of their right to appeal to the Public Service Commission within 6 weeks which they did not, hence, they cannot come and invoke the jurisdiction of the court as they sat on their right of appeal.

33. I have examined all the averments and submissions of the parties herein. The brief submissions of the Petitioners' case is that they were condemned unheard and that due process was not followed by the Respondents in meting out the various punishments against them.

34. The issues for this Court to determine are as follows:-

1. Whether the Respondents violated the Petitioners' rights by subjecting them to interdictions, half pay and dismissal under Article 27, 28, 41, 47 and 50 of the Constitution.

2. What remedies to grant in the circumstances.

35. In determining this Petition, I am guided by the well-founded principles settled by the Court of Appeal in **Anarita Karimi Njeru vs Republic (1976-80) IKLR 1272**.

36. The Court of Appeal held that a person alleging contravention of his constitutional rights must set out the right infringed upon and the manner in which the said right has been infringed upon.

37. The Petitioners have alleged this right under Article 27 of the Constitution were infringed upon. Article 27 of the Constitution of Kenya provides as follows:-

(1) "Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated

in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender”.

38. The Petitioners alleged discrimination against them in that they were either demoted or terminated from employment. Discrimination is defined in Blacks Law 9th Edition at page 534 as:-

“The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or disability. Differential treatment especially failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured”.

39. The above definition envisages treating one group differently or preferentially as against another group under similar circumstances. In submitting that they were treated in a discriminatory manner the Petitioners did not point out what they were subjected to in a discriminatory manner as opposed to a different group under similar circumstances.

40. In is my finding that the issue of discrimination does not arise and the Petitioners’ contention is therefore not founded.

41. The Petitioners also submitted that their right under Article 28 of the Constitution was flouted. Article 28 of the states as follows:-

“Every person has inherent dignity and the right to have that dignity respected and protected”.

42. The Petitioners in their Petition submitted that they were treated in an undignified and disrespectful manner. The Petitioners have averred that the law under Article 41, 47 and 50 of the Constitution were not followed. Article 41 deals with fair labour practices. Article 47 is labour fair administrative action whereas Article 50 also deals with a fair hearing.

43. In submitting this, the Petitioners have averred that they were condemned unheard.

44. From the evidence adduced by the Petitioners they were interdicted and their salaries reduced and others demoted or dismissed without due process.

45. The Respondents indicated that the Petitioners were given a fair hearing. They aver that the Petitioners were given time to make and explain themselves. That the wrong committed was brought to their attention and they made a response in form of a defence which the Respondents gave consideration before arriving at their decision.

46. The Respondents submitted that fair hearing encompasses many aspects such as the need for prior adequate notice, opportunity to sufficiently present ones case but that these components are not fixed and are variable, their scope and applicability varying from case to case.

47. The Respondents cited the Court of Appeal in **Kenya Posts Authority vs Fadhil Juma Kisuuswa (2017) eKLR** where the Court cited **Local Government Board vs Arlidge (1915) A.C 120, 132-133, Selvarajan v Race Relations Board (1975) I WLR 1682, 1694 and in Republic vs Immigration Tribunal ex-parte Jones (1988) I WLR 477**, where it was held:-

“The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than Courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing.....whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made”.

48. In determining the case before it the Court of Appeal was categorical that:-

“It must however be stressed that the necessity of oral hearing will depend on the subject and nature of the dispute, the whole circumstances of the particular cases”.

49. Indeed that preposition as stated by the Court of Appeal envisages that in the instant case, I must examine the circumstances of the disciplinary process to understand whether an oral hearing was therefore mandatory.

50. The Petitioners were asked to submit their academic certificates which they did. The certificates were suspected to be forged. They were asked to explain themselves and they did so in writing.

51. The Respondent's Human Resource Committee considered their presentation and made their finding that the certificates were forgeries and were retained and decision made against the Petitioners.

52. Would an oral hearing have made a difference in whether the certificates were forged or not?. The Petitioners in their written submissions indicated that they attended trade tests and passed and were awarded the said certificates by the 2nd Respondent.

53. An oral hearing would have made a difference had the Petitioners been allowed the same. They may have explained what dates the tests were held and where and other questions put to them to explain the manner or mode in which they received the said certificates and also why they believed they were authentic. In this case, it would have been necessary to have an oral hearing.

54. It is also important to distinguish this case with the case **of Kenya Posts Authority** (supra) where the Court was dealing with employees from Kenya Ports Authority.

55. The current Petition deals with employees of the Armed Forces and by virtue of Section 3(2) of the Employment Act.....

“This Act shall not apply to the armed forces on the resource as respectively defined in the Armed Forces”.

56. The Constitution of Kenya on the other hand binds all persons, all state organs at both levels of government (Article 2).

57. In the circumstances, the rights of the Petitioners to a fair hearing as envisaged under Article 41, 47 and 50 of the Constitution was mandatory. It is clear that the Petitioners were subjected to a flawed disciplinary process.

58. The Respondent applied the procedures set out in the Public Service Commission discipline manual paragraph 4.0 (e) which states that:-

“The following shall be observed while processing discipline cases. The Officer should be notified in writing, be given the particulars of the misconduct as preferred and reasonable opportunity to respond to the allegations”.

59. This could be the provision of the Human Resource Manual but which in my view were flawed as they do not measure to what the Constitution envisages on fair administrative action.

60. The Petitioners were however given an opportunity to appeal to the Public Service Commission within 6 weeks of being informed of the decision by the committee but they did not. The Petitioners aver that they actually appealed and are awaiting for the decision of the public Service Commission to date. This contention has however not been proved by the Petitioners as they never attached any documents as proof that they appealed to the Public Service Commission. That notwithstanding, it is my finding that the rights of the Petitioners to a fair hearing was not accorded to them.

61. Following the disciplinary process the Petitioners were interdicted which interdiction was lifted for some of them. Others were accordingly demoted and others dismissed.

62. Interdiction as a disciplinary process is allowed in law as per the Public Service Commission Manual which provides as follows:-

(a) “An officer may be interdicted where gross misconduct which is likely to lead to dismissal is reported and requires investigation or a report that an officer has been charged in criminal proceedings is received.

(b) If the case relates to a criminal charge, the officer is served with an interdiction letter, a sample of which is provided in Appendix I.

(c) If the misconduct is one which can lead to dismissal but is not of criminal nature, the officer shall be served with a ‘show cause letter’ which shall also contain a communication on interdiction, a sample of which is provided in Appendix II.

(d) A public officer on interdiction shall be entitled to half of his basic salary, full house allowance and medical insurance cover.

(e) A public officer who is on interdiction should not leave the duty station without the permission of the Authorized Officer or any other public officer who is empowered to give such permission.

(f) A public officer whose interdiction has been lifted shall promptly be served with a decision letter, a sample of which is provided in Appendix III. Any withheld salary, allowances and benefits will be restored with effect from the date it was withheld.

63. In this case, the punishment of interdiction during investigation was proper. This interdiction was lifted. The Petitioners were therefore entitled to all withheld salaries except for those who were dismissed. I agree with the Petitioners' submissions that following the lifting of the interdiction, they were entitled to all withheld salaries and I order that to be the case.

64. For Petitioner 1 to 22, I find for them and order they be paid as per paragraph 14 C of the Amended Petition except for the 10th, 20th and 22nd, 24th and 25th Petitioners who were dismissed.

65. Concerning other prayers, the Petitioners have sought including an order that the Petitioner 1 to 9th, 11th to 19th, 21, 23 and 26th be promoted to Job Groups, which they ought to have been, I find that this is purely an issue that should have been established by the Petitioners through evidence. They chose not to call any witnesses or even present their oral evidence in Court. Their right to hold positions they occupied previously cannot be ascertained by Court without evidence.

66. This is a matter which the Petitioner should have litigated as a normal employment cause and which they did not. I therefore find no justification to grant the said prayer.

67. In the same vain, the prayer on whether the demotion was proper or not has not been tested by this Court and therefore prayer to reverse the 2,000/= deduction from the salary cannot be awarded.

68. The 16th and 21st Petitioner will be paid their pension earned during the employment period and the issue of backdating the same cannot arise at this point as the amount is not held by the Respondents but the Pension Department, which is not part of these proceedings.

69. The upshot is that I find for Petitioners and declare as follows:-

1. Their rights under Articles 41, 47 and 50 were infringed upon.

2. They Petitioners shall be paid all their dues withheld during the interdiction period except for Petitioners No. 10th, 20th, 22nd, 24th and 25th Petitioners who were dismissed.

3. Each Petitioner be paid 500,000/= as damages for breach of their constitutional rights as indicated above.

4. Costs of this Petition be borne by the Respondents.

Dated and delivered in open Court this 18th day of June, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nyamombo holding brief for Imanyara for Claimant

Respondent – Absent