



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

AT NAIROBI

PETITION NO. 79 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 11th June, 2018)

NIXON OTIENO AWUOR.....1ST PETITIONER
MAURICE OCHIENG OKERE.....2ND PETITIONER
LUKE MUGO GATIMU.....3RD PETITIONER
BEDAN NDEGWA WAMBUI.....4TH PETITIONER
SHABAN ASMAN.....5TH PETITIONER

VERSUS

THE INSPECTOR GENERAL OF
THE NATIONAL POLICE SERVICE.....1ST RESPONDENT
THE DIRECTOR OF CRIMINAL INVESTIGATIONS....2ND RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT
THE GOVERNOR OF THE COUNTY OF NAIROBI.....4TH RESPONDENT
THE COUNTY GOVERNMENT OF NAIROBI.....5TH RESPONDENT

JUDGEMENT

1. The Petition before Court is the one filed by the Petitioners herein on 29.9.2017. The Petitioners are all employees of the County Government of Nairobi. The Petitioners aver that they were employed by the 5th Respondent on different dated in 1987, 2011, 1999, 2012 and for 5th Petitioner for over 30 years respectively.

2. All the 5 Petitioners served the Respondent in the Accounts or Finance Departments.

3. The Petitioners aver that the procedure for collection of the 5th Respondent's money was prepared by the Senior Revenue Officer which indicated as follows:-

a) The cashier who receive money from the Public would at the end of their working day which was 5 pm have the money tallied and counted.

b) The money would then be locked in the County's Safe.

c) The 4 people had a key for the Safe who were a Supervisor of the Cash Office, 2 Internal Auditors and 1st Petitioner, Ag. Head of Revenue.

d) That the next morning the 4 key holders would appear at the Safe and open it and recount the money and the 1st Petitioner would prepare banking slips for money collected and await the arrival of a representative from Co-operative Bank to come and collect the money.

e) That upon the arrival of the bank's representative, the said representative would recount the money and confirm the banking slips were in order where after the bank's representative would call the bank and they would sent a security van to collect the said moneys.

The Petitioners' case

4. The Petitioners' case is that on the morning of 23rd August 2017 at about 9 am none of them were in the 5th Respondent's cash office when a group of well build men entered the cash office.
5. The Petitioners had no knowledge of who these persons were but only learnt of the events that took place at the cash office by means of clips that they saw on various social media platforms.
6. The Petitioners state they saw a group of people unknown to them in the cash office with the 4th Respondent rummaging the cash office and claiming that the Chief Cashier a Mr. Reuben Gahukia was attempting to steal the 5th Respondent's cash that had been received by the cashiers the following day.
7. The Petitioners state that what they saw and heard was that the Chief Cashier was going to great lengths to explain to the 4th Respondent the procedure that was in place with regard to the collection of the 5th Respondent's monies which led the 4th Respondent to call the Bank Manager for Co-operative Bank who confirmed that it was the error of the bank's officers as to why the money had not been collected and not the Chief Cashier's fault.
8. The Petitioners state that they learnt that the 4th Respondent was not satisfied with the explanation and referred the matter to the 5th Respondent's Chief Officer of the City Inspectorate and the County Director of Investigations who after investigations came to the conclusion that no monies of the 5th Respondent had been lost or misappropriated. The Petitioners were expected to believe that the matter had been resolved.
9. The Petitioners further aver that under Regulation 81(2) of the Public Finance Management (County Government) Regulations 2015 as indicated in Legal Notice No. 35 of 20th March 2015, the Petitioners were aware that the revenue officers of the 5th Respondent are entitled to hold on the 5th Respondent's moneys for a period of 5 days.
10. The Petitioners aver that later that evening, the events of the morning were televised on the evening news. That the widespread publicity of the events caused the Petitioners to suffer untold grief and mental anxiety as they are now perceived by the general public to be corrupt individuals stealing money that belongs to the 5th Respondent.
11. They aver that the news report gave the impression that the employees of the 5th Respondent's Finance Department were attempting to steal Kshs.7,803,876/= in cash of the 5th Respondent's money.
12. The Petitioners states that on 24/8/2017 and on 25/8/2015 unknown persons kept coming to their offices making inquiries into the events of the previous day and the working procedures. That as a result of the constant presence of these unknown people, 3rd Petitioner states that he approached the 5th Respondent's Security Officer to take steps to protect them.
13. The Petitioners and other junior staff were further subjected to questioning on diverse dates on 28th and 29th August 2017. On 29.8.2017, they were now arrested and taken to Muthaiga Police Station. They were denied bond and that the police declined to explain why the Petitioners were being held.
14. It is the Petitioners' case that the police officers only made comments that the charges related to 'abuse of office'. The next day they were arraigned before the CM's Court in Nairobi and learnt that they had been arrested since the 4th Respondent made a report against them reported under OB No.43/29/08/2017 and that the 2nd Respondent was making an application to have all the Petitioners detained for a further 5 days to enable them conclude their investigations. This was in **Chief Magistrate's Misc. Criminal case No. 2736 of 2017 DCI Headquarters Reuben Njuguna Gachukia and 6 others.**
15. The Petitioners contend that from the Application, the 2nd Respondent intended to investigate the Petitioners for the purpose of preferring "Abuse of Office" charges with regard to the events of the 23rd August 2017.
16. Before the Magistrate's Court, the Petitioners were granted bond of 50,000/= each.
17. The Petitioners aver that to date they have not received any official reprimand from the 5th Respondent but fear that unless restrained the 4th and 5th Respondents will proceed to sanction the Petitioners which will result in the Petitioners losing their employment with the 5th Respondent based on an illegal act by the 4th Respondent and fears that such an abuse will be unconstitutional and in breach of the Petitioner's rights as allowed under the Bill of Rights and that they stand to suffer great loss.

18. The Petitioners contend that their rights under Article 27 and 41(1) of the Constitution is being infringed.

19. The Petitioners contend that the action of the 4th Respondent is calculated to have them terminated and replaced by persons more malleable to the control and authority of the 4th Respondent.

20. The Petitioners state that the 2nd and 3rd Respondents intend to invade and violate their rights to privacy by continuing to conduct investigations to support a charge of abuse of office against him which investigations will involve prying into their private life and personal expenses of the Petitioners which is in complete violation of their rights not to have information relating to their family or private affair unnecessarily required or revealed as demanded under the provisions of Article 31(c) of the Constitution.

21. The Petitioners aver that this Court has locus to deal with this Petition under Acts 2(1), 3(1), 10, 22(1), 27, 31(c), 41(1), 50 (1), 258 and 259 of the Constitution.

22. The Petitioners therefore seek orders as follows:-

a. A Declaration that the Petitioner's rights as enshrined in the Constitution with respect to equality and privacy have been infringed by the acts and/or omissions of the Respondents;

b. A Declaration that any punitive action taken by the 4th and 5th Respondent against the Petitioners employment is ultra vires and should be declared null and void;

c. Conservatory Orders prohibiting the 1st, 2nd and 3rd Respondents from investigating and prosecution against the Petitioners based on the events of 23rd August 2017 and the subsequent actions;

d. A Declaration that the Petitioner is deserving of damages to be assessed by this Honourable Court;

e. Costs and interests.

23. The 2nd Respondent filed Grounds Opposition against this Petition based on the following grounds that:-

1. The Petitioners have not demonstrated with precision how their fundamental rights and freedoms under the Constitution have been violated or are threatened contrary to Article 22(1) of the Constitution and the holding in the locus classicus decision in Mumo Matemu vs Trusted Society of Human Rights Alliance (2013) Eklr and Annarita Karimi Njeru (1999) KLR 154.

2. The Petitioners have rushed to Court prematurely to stop the disciplinary proceedings such that nothing has been done in contravention of the law and the Constitution. There is no material before the Court to show why and how they will suffer prejudice if they are subjected to the disciplinary proceedings.

3. The Petition is speculative and full of conjecture that due process will not be adhered to. The fact that the proceedings have consequences of leading to a dismissal from service is not a ground for the Petitioners to be excluded from the disciplinary process.

4. The Petitioners have declared themselves unaccountable and unanswerable to their employer and seek this Court to rubber stamp their wishes contrary to Article 10 and Chapter six (6) of the Constitution. No one is indispensable and no one is immutably immune from a vertical accountability to one's employer.

5. The Petitioners' denial, defiance, violation or repudiation of such accountability and answerability to the 1st Respondent constitutes insufferable act of insubordination inviting appropriate disciplinary measures.

6. The Petitioners are well aware of the nature of the complaint facing them to wit-that on 23rd August 2017 the DCD found them with Kshs.7,803,876/= office money which should have been deposited by close to business on 22nd August 2017. The Petitioners are clinging on a technicality that the relevant sections of the law were misquoted but have failed out of abundance of caution to respond to the substance of the complaints against them.

7. There is no legal underpinning barring the employer from disciplining its employees on account of pending criminal charges as employers are not bound by the outcome of either convictions or acquittals. Disciplinary proceedings are not criminal in nature and should never be subjected to the Criminal Procedure Code or Article 50 of the Constitution.

8. The Petitioners want this Court to micro-manage the human resource functions of the 1st Respondent contrary to the law and the Constitution.

9. This Honourable Court has a Constitutional obligation pursuant to Article 3(1) of the Constitution to respect, uphold and defend the Constitution and this would include safeguarding and securing the independence of county Government in managing its affairs and workforce.

10. The Petition is scandalous, vexatious and amounts to an abuse of the Court process.

11. The orders sought are discretionary and their scope and purpose is limited and in the circumstances, it will be in the interest of justice that they are denied.

12. The Respondents pray that the notice of motion Application and Petition be dismissed with costs.

24. The 1st Respondent filed a Preliminary Objection on 4/12/2017 on the grounds that:-

1) The Petition is premature, otherwise an abuse of the legal process and filed in breach of the specific procedure provided for under Section 77 of the County Government Act and Section 85 and 86 of the Public Service Commission Act.

2) The Petition and Application is sub-judice in Nairobi High Court Petitions No. 436/2017 and C464/2017 between the Petitioners, the County Government of Nairobi, the Directorate of Criminal Investigations, the Director of Public Prosecutions where the Petitioners seek similar orders based on similar set of facts.

3) The Application is bad in law, frivolous, vexatious and otherwise an abuse of the Court process and should be struck out/dissmissed with costs.

25. The Parties herein also filed their submissions. The Petitioners have submitted that the Petitioners were discriminated against in contravention of Article 236 of the Constitution. They also submit that they were denied their fundamental rights and freedom under Article 22(1) of the Constitution.

26. They also submitted that their right to Fair Administrative Action Act and Section 4(3) of the Fair Administrative Action Act as well as Articles 27, 29 and 41(1) and 236 of the Constitution were infringed upon in that they were discriminated upon and given punishment in a cruel, inhuman and degrading manner. Their right to privacy was also curtailed.

27. Article 236 of the Constitution provides that:-

“A public officer shall not be:-

(a) victimized or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or

(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law”.

28. Section 4(3) of the Fair Administrative Action Act on the other hand provides 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;

b) An opportunity to be heard and to make representations in that regard;

c) Notice of a right to a review or internal appeal against an administrative decision, where applicable;

d) A statement of reasons pursuant to Section 6;

e) Notice of the right to legal representation, where applicable;

f) Notice of the right to cross-examine or where applicable; or

g) Information, materials and evidence to be relied upon in making the decision or taking the administrative action.

29. They have also averred that Regulation 81(2) of the Public Finance Management (County Government) Regulation 2015 Legal Notice No. 3 of 20th March 2015 permits them as Revenue Officers to hold Nairobi County Funds for a period of upto day pending banking.

30. The Respondents on the other hand submitted that the Application is premature and that the Petitioners were subjected to a fair process. They aver that the Petitioners cannot submit that they have been denied a chance to be heard when they were offered an opportunity to submit their written representations but refused, ignored and failed to do so in light of the procedures set out in the County Government Act and Public Service Commission Act.

31. They submit that their alleged breach of constitutional rights has no basis at all.

32. They further submit that the Respondents acted rightly by interdicting the Applicants and that no illegality had been committed.

33. I have considered all the averments and submissions of both parties. I note that the Applicants approached this Court on 29/9/2017 and

obtained interim orders before Hon. Judge Wa Makau. The Application was set for hearing on 12/10/2017 inter-partes but it was not until 6/11/2017 that the Application was heard inter-partes.

34. The interim orders had granted conservatory orders staying any further action by the 1st Respondent to its letters of 31.8.2017 which letters were show cause letters. These letters required the Applicants to explain why disciplinary action should not be taken against them. A reply was expected within 10 days but instead of responding, the Applicants chose to come to Court where further action was stopped on these letters. By the same letters, the Appellants were interdicted.

35. Interdiction is indeed part of an employer's disciplinary process where the employer is convinced that an indiscipline has been occasioned by the employee. By this time the Applicants had already filed Nairobi CM's Misc. Case No. 2736/2017 and were released on cash bail. The Applicants are currently charged with abuse of office related charges at the same Court.

36. Whereas Applicants had a right to appear before Court and seek orders as they did, I note that their quest was premature. When they were issued with show cause letters, the prudent thing would have been to respond. They did not respond. This Court has over and over again stated that it would not interfere with the employers' internal disciplinary processes unless the same is flawed. If this is not done this could be a keen to micro managing the human resource functions of the employees.

37. In Court of Appeal case of **Judicial Service Commission vs Gladys Boss Shollei, Civil Appeal No. 50 of 2014** the Court opined as follows:-

“It is worth noting that Courts ought to be slow to make determinations that are on the face of them, unrealistic and bordering on the cynical. Courts do intervene in employer-employee disputes but even as they do so, they must appreciate that the workplace must be allowed and enabled to operate in a manner that is productive and harmonious. Courts cannot micro-manage the human resource function of other institutions be they in the public or in the private sector. It is thus clear to me that a judge oversteps his mandate when he fails to give due and grave consideration to the intractable difficulty an employer faces when faced with insubordination which is really a form of headstrong defiance and open rebellion to lawful authority. In such instances, the act of firing the employee properly taken should not invite the Courts' quashing power by way of certiorari as happened herein. In this respect I fully agree with the decision of the South African Labour Court in Nampak Corrugated Wadeville vs Khoza (JA 14/98(1998) ZALAC 24 in which Ngcobo JA stated as follows:-

“33 The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A Court should, therefore, not lightly interfere with the sanction composed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether it could have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable”.

38. I do agree with the Court of Appeal's above proposition that this Court would not interfere with the employers' discretion in imposing sanctions against an employee unless the same has been exercised unfairly.

39. In this Court's view, the employer/Respondent acted within its mandate after suspecting some wrong doing on the part of the Applicants.

40. The process of unearthing the wrong doing may have been hasty and improper but once there was reasonable suspicion and the Applicants were asked to respond, they should have responded. Rushing to Court was in my view imprudent and premature.

41. In the circumstances, I do not find the Petitioners orders tenable. I will not allow the prayers sought.

42. The Petitioners are free to respond to the show cause letters issued against them within 14 days from the date of this judgement and allow the Respondents to proceed with the disciplinary process in order to allow due process. In the same vain, the Respondents are free to restart their internal disciplinary process as they had began in order to ensure fairness on their part and also on the Petitioners part.

43. Each Party will pay their own costs.

Dated and delivered in open Court this 11th day of June, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Chege holding brief for Litoro for Respondents – Present

Petitioners – Absent