



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**PETITION NO. 91 OF 2017**

(Before Hon. Justice Hellen S. Wasilwa on 11<sup>th</sup> June, 2018)

**PETER KATHAE MUSYIMI**

**ELLY VICTOR OREMO.....PETITIONERS**

**VERSUS**

**MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL GOVERNMENT (DIRECTORATE  
OF IMMIGRATION AND REGISTRATION OF PERSONS).....RESPONDENT**

**JUDGEMENT**

1. The Petitioners filed their Petition on 19/10/2017 through the firm of T. O. K'opere & Co. Advocates. The Petitioners have stated that at all material time they were public servants employed by the Respondent until they were verbally sent on compulsory leave on 17/05/2016 following a spot-check and ambush at their work station at the temporary permits section tents outside the respondent's headquarters at Nyayo House by their immediate boss Mr. J. N. Gakobe accompanied by other officers from the department.
2. The Petitioners aver that they were shocked to receive letters dated 13/07/2016 alleging that they had deserted duty and that they had committed gross misconduct to which they responded on 27/10/2016 and 28/07/2016 stating that they had been directed to stay away from Nyayo House and await official communication from the department by their Boss.
3. They aver that they were never called for any disciplinary hearing nor given any chance to be heard before the Ministerial Human Resource Management Advisory Committee nor were they aware of the recommendations of the said committee dated 16/02/2017 whose contents they had never seen only that the same is reflected in the body of the dismissal letters.
4. They have stated that they were also not served with any Notice to show cause letters, warnings or taken through any disciplinary procedures on allegations which they were never aware of and only learnt that their salaries had been stopped and despite concerted efforts and demand letters, the Respondents refused, failed and neglected to respond in gross violation of the Petitioners labour and constitutional rights.
5. They state that they stay with their families in Nairobi and had SACCO loans with Harambee, Co-operative SACCO which have been recalled and if orders sought are not granted, they stand to suffer irreparable loss and damages.
6. In their grounds of opposition, the Respondent avers that their actions were neither illegal, unlawful nor contravened the rules of natural Justice as alleged by the Petitioners and that the remedies should have been sought through an employment and labour relations claim as opposed to a Petition as that is where the damages can be granted. They further aver that the Petition is baseless, misconceived and devoid of any merit and orders sought should not be granted.
7. The Respondent filed the replying affidavit where they aver that between the month of January and April 2016 or there about, there was a major decline in revenue, which prompted the accounting department to conduct an impromptu inspection at the temporary permit section. During the inspection, they found two Clerical Officers who are the Petitioners with temporary permit receipt books which were not official receipt books. Disciplinary action was taken by Ministerial Human Resource Management Advisory Committee (MHRMAC) and the two Clerical Officers were dismissed. The Petitioners did not appeal the decision of Ministerial Human Resource Management Advisory Committee (NHRMAC) to the Public Service Commission and therefore they are in Court prematurely since they did not exhaust all the available avenues.

8. They further aver that it is only fair and in the interest of justice that the matter is first referred to the Public Service Commission before being brought to court under section 74 of the Public Service Commission Act.

### **Submissions**

9. The Petitioners filed their submissions where they submit that the decision to dismiss them from Public Service based on the Inspection Report dated 17/05/2016 and the recommendations of the Ministerial Human Resource Advisory Committee dated 16/02/2016 was unconstitutional, ultra-vires and offended the cardinal rules of natural Justice as they were never heard before being condemned or even given an opportunity to be heard in violation of Article 47 and 50 of the Constitution of Kenya.

10. They further submit that the Respondents have not tendered any material whatsoever before the Court to support the grounds of opposition dated 15/12/2017 to prove that the Petition lacks merit and that the Respondent's actions were legal, justified, lawful and not in contravention of the laws and that the Employment and Labour Relations Court has Jurisdiction to grant orders which emanate from the Constitution including Judicial Review Orders.

11. On the issue of unfair termination and unlawful dismissal, the Petitioners relied on the case of **Mary Chemweno Kiptui Vs Kenya Pipeline Co. Ltd [2014] eKLR** where the Court held that the decision to terminate (dismiss) an employee is a penalty with serious consequences and utmost regard and notice must be given to the law and procedure and further that the rights to Fair Labour Practice, Fair Administrative Action and Fair hearing must be followed. The right to be heard was also guided by the pronouncement of **Nyeri High Court Petition No. 12 of 2015** in the case of **Gladys Nyawira & Others Vs County Government of Nyeri [2016] eKLR**.

12. They state that they have proven their case within the requisite standard on a balance of probabilities and pray that the relief sought be granted.

13. In their submissions, the Respondents submit that the Petitioners are prematurely before the Court as they had not exhausted all the avenues before coming before Court for determination hence they should be referred to Public Service Commission for determination before invoking the powers of the Court. They are also invoking an alternative dispute resolution which is also statutory and procedural for the Petitioners as per the Public Service Disciplinary Manual.

14. They further submit that the Petitioners have not proved before the Court any injustice and unfairness subjected to them by the Respondent as they were legally and fairly dismissed and accorded a fair hearing as per the laid down procedures by the Public Service Commission.

15. They state that the Petitioner did not raise any issue and or complain to the Human Resource Management on the claimed directive as they comfortably stayed at home and now want to gain from non-performance and hence the Respondents are opposed to the reinstatement of the Petitioners. This was guided by the case of **Tommy Otto vs Uganda, Wildlife Authority [2002] HCT-00-CC-CS-2008 of 2002**.

16. The Respondent avers that the Petitioners were reasonably and fairly dismissed for absconding duty and they were granted hearing and the statutory procedure was followed. They failed to attend work for more than 24 hours without official communication hence they are not entitled to any damages and/or costs as they have not shown the Court how their fundamental rights and freedoms have been infringed. Therefore, the Petition should be dismissed with costs to the Respondent.

17. I have considered the averments and submissions of both parties. The Petitioners seek the following orders:-

**a. A Declaration that the Respondent's Ministerial Human Resource Management Advisory Committee Proceedings and Recommendations dated 16/02/2017 and the Dismissal letters dated 10/05/2017 are Ultra-Vires, offends the Rules of natural justice are irregular, unprocedural, illegal, null and void and of no effect in law.**

**b. A declaration that the Petitioners should remain in Public Service until and unless they are lawfully and regularly terminated/dismissed or discharged from public service as by law required after following due process.**

**c. Reinstatement of the Petitioners back to their jobs and posting of the Petitioners to continue servicing as Public Servants.**

**d. Payment of all salaries of the Petitioners which were withheld by the Respondents from 18/05/2016 until the date of judgement, re-instatement and posting.**

**e. Compensation by way of damages for violation of the Petitioners constitutional rights, inhuman and degrading treatment by the Respondent.**

**f. Costs of this Petition and interest on all heads of Awards at Court rates from the date of filing this Petition until the date of full payment.**

**g. Any other or further relief that this Honourable Court may deem just and fair to grant in the circumstances of this case.**

18. This Petition is filed under Article 22 and 47 of the Constitution of Kenya and Section 43, 44, 45, 49 and 50 of the Employment Act and the provisions of the Public Service Commission Act.

19. Article 22 of the Constitution of Kenya 2010 envisages that every person has a right to institute Court proceedings claiming that a right or

fundamental freedom in the bill of rights has been denied, violated and fringed or is threatened.

20. Article 41 of the same Constitution deals with labour rights which include fair labour practices. Article 47 of the Constitution on the other hand deals with fair administrative action. The Petition has been filed under the above provisions of the law.

21. The contention of the Petitioners is that they were dismissed without any fair process and without fair labour practices.

22. They have contended that they were never afforded an opportunity to appear before the Ministerial Human Resource Management Advisory Committee to defend themselves from any allegations leading to dismissal.

23. The contention by the Petitioners is true that they were never accorded any hearing or subjected to any disciplinary process before being dismissed.

24. Under Article 47 (1) and (2) of the Constitution:-

1. **“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

25. Indeed the Constitution is clear on a disciplinary process that is lawful and procedurally fair.

26. Section 4(3) (4) and (5) of the Fair Administrative Action Act 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;**

**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.**

4. **The administrator shall accord the person against whom administrative action is taken an opportunity to:-**

**a. attend proceedings, in person or in the company of an expert of his choice;**

**b. be heard;**

**c. cross-examine persons who give adverse evidence against him; and**

**d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.**

5. **Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.**

27. Thus the requirement that a person that is likely to be effected by an administration action should be given prior notice of the action and be given reasons, to be heard, notice of a right to review etc cannot be wished away.

28. The Respondents have submitted that the Applicants' came to Court prematurely and that they should have exhausted the appeal process as provided under Section 74 of the Public Service Commission Act which provides as follows:-

1. **“Any person who is dissatisfied or affected by a decision made by an authorized officer or other authority in exercise or purported exercise of disciplinary control against any public officer under this Act may appeal to the Commission.**

**2. An appeal under subsection (1) shall be made in writing within ninety days from the date of the decision appealed against:**

**Provided that the Commission may consider an appeal that was made out of time if, in the opinion of the Commission, the circumstances warrant such consideration.**

**3. The Commission shall not entertain an appeal by a public officer or a representative of a public officer, in respect of a particular decision, more than once.**

4. Despite the right of appeal conferred on a public officer by this section, disciplinary action shall not be deferred or suspended pending the determination of the appeal.

**5. After considering an appeal, the Commission may:-**

**a. uphold the decision;**

**b. set the decision aside;**

**c. vary the decision as it considers to be just;**

**d. give such directions as it may consider appropriate with respect to the decision;**

**e. direct the refund, reinstatement of remuneration or release of any withheld payments due to the public officer as it considers to be just;**

**f. direct that disciplinary action be taken against any public officer who has failed to discharge a duty that was the public officer's responsibility to perform in relation to the disciplinary case and the concerned public body has suffered a loss; or**

**g. make any other appropriate decision in view of the circumstances of the case.**

**6. Where the Commission sets aside a decision under subsection (5)(b), the public officer shall revert to the previous status held and receive the attendant benefits as though the decision set aside was never made.**

29. It is true that under the Public Service Commission Act, an appeal can be preferred to the Public Service Commission where anyone is dissatisfied with an administrative process and decision. This goes hand in hand with that right having been explained to the persons affected. Indeed the Petitioners were informed in their letter of dismissal dated 10.5.2017 that they were at liberty to appeal against the decision to the Secretary, Public Service Commission through the Ministry within 42 days from the date of the said dismissal letter.

30. The Petitioners chose not to pursue this root of appeal but filed this Petition on 19/10/2017.

31. By failing to pursue to pursue an appeal before the Public Service Commission, the Petitioners chose the shorter but costly root of coming to Court. The question however is whether this Court is fettered from exercising its discretion to hear a party who petitions it for reliefs even after not exhausting the internal appeal mechanisms.

32. The proviso in law is that this Court has exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 16 and 21 of the Constitution and provisions of the Employment & Labour Relations Court Cap 234B Laws of Kenya as provided for under Section 12(1) of the said Act. By virtue of this jurisdiction, the Court cannot throw out a party who chooses to appear before it seeking certain reliefs on the ground that internal disciplinary processes were never exhausted.

33. The premise is however with Judicial Review Application where Section 9(2) of Fair Administrative Actions Act states that:-

**“The High Court or a subordinate Court under Section 5(1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted”.**

34. The matter before me is a Petition and therefore the provisions of Section 9(2) of the Fair Administrative Action Act will not apply. In the circumstances, I do find that indeed the Respondents failed in their duty by dismissing the Petitioners without subjecting them to a fair disciplinary process as envisaged under Article 47 of the Constitution. There is no indication that the Petitioners were given any oral hearing to explain themselves.

35. It is clear that the right to be heard which is a cardinal rule of natural justice was thrown out of the window by the Respondents.

36. Other than this requirement for fair hearing, Article 41 of the Constitution on fair labour practices was also not adhered to.

37. What remedies there are the Petitioners entitled to?.

38. The Petitioners sought various declaratory remedies including reinstatement. I do find for the Petitioners and order as follows:-

1. A Declaration that the Respondents Ministerial Human Resource Management Advisory Committee proceedings and recommendation dated 16/2/2017 and the dismissal letter dated 10/5/2017 are ultra vires, offends the rules of natural justice, are irregular, unprocedural, illegal and null and void.
2. A declaration that the Petitioners should remain in public service until and unless they are lawfully and regularly terminated/dismissed or discharged from public service as by law required after following due process.
3. The Petitioners are reinstated/re-engaged back to their job in the public service.
4. Payment of all salaries of the Petitioners which were withheld from the date of the alleged dismissal until the date of this judgement and reinstatement, re-engagement/or posting.
5. Costs of this Petition be borne by the Respondents.

Dated and delivered in open Court this 11<sup>th</sup> day of June, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Motende for Respondents – Present

Petitioner – Absent