



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 31 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

**IN THE MATTER OF ARTICLE 22(1) AND ARTICLE 23 OF
THE CONSTITUTION OF THE REPUBLIC OF KENYA**

IN THE MATTER OF ARTICLES 10, 22, 23, 41, 73, 75, 232 AND 236

OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

THE ALLEGED CONTRAVENTION OF ARTICLES 10, 22, 23, 41, 73, 75,

232 AND 236 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

IN THE MATTER OF alleged contravention of rights or fundamental freedoms

under articles 3, 10, 20(1), 27, 28, 29(f), 31(c), 31(d), 41, 43, 47, 48, 50, 73(1)(a),

79 [as read together with Article 250(1)], 156, SECTION 31(1) AND (2) OF THE

SIXTH SCHEDULE OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

BETWEEN

SOITA WASIKE.....PETITIONER

VERSUS

ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

HALAKHE WAQO.....1ST INTERESTED PARTY

MICHAEL MUBEA.....2ND INTERESTED PARTY

JUDGMENT

SOITA WASIKE the petitioner was appointed by the 1st respondent, the Ethics and Anti-Corruption Commission, a constitutional body established under Article 79 of the Constitution and Section 3(1) of the Ethics and Anti-Corruption Commission Act as a corporate body, in 2005 as Financial Forensic Investigator III on a renewable 3 year fixed term contract. In 2006 he was promoted to Financial Forensic Investigator II. His contract was renewed in 2008 for term of 4 years.

In the wake of the new Constitution and the Ethics and Anti-Corruption Commission Act of 2011, it was a requirement that the Commission vets all serving and new staff to determine their suitability for employment retention by the Commission.

Before the vetting process was commenced, an internal memo dated 20th February 2013 was sent to all staff members of the Commission notifying them of the schedule for the vetting exercise. The claimant's employment was terminated following the vetting.

In his petition dated 22nd and filed on 24th March 2016, the petitioner avers that the 1st respondent and the 1st and 2nd Interested Parties violated a myriad of provisions of the constitution, the Employment Act and the Ethics and Anti-Corruption Commission Act in terminating his employment. The provisions he avers were violated are the Articles 10, 22, 23, 41, 73, 75, 232 and 236 of the constitution of Kenya and alleged contravention of rights or fundamental freedoms under articles 3, 10, 20(1), 27, 28, 29(f), 31(c), 31(d), 41, 43, 47, 48, 50, 73(1)(a), 79 [as read together with Article 250(1)], 156, section 31(1) and (2) of the sixth schedule of the Constitution of Kenya

The petitioner seeks the following remedies –

1. A declaration that, the Respondents' conduct amounts to discrimination and to that extent, is discriminatory against the Petitioner under Article 27 of the constitution.
2. A declaration that, the respondent's conduct, acts of commission and/ or omission are unlawful, illegal and or unfair and the same violates Petitioner's Fundamental Rights and Freedoms to human dignity, freedom and security of the person, privacy, right to information, fair labour practices, social welfare, right to Fair Administrative Action and access to justice as encapsulated under Articles 20 (1), 28, 29 (f), 31 (C), 31 (d), 35, 41, 43 47, 48 and 50 of the constitution, respectively, and that the said rights and freedoms have been violated, transgressed and trampled upon by the Respondents.
3. A declaration that the process leading up to, including the decision, findings and recommendations of the Vetting Committee of 1st Respondent was unconstitutional, unprocedural, substantively unconstitutional, high handed, biased, lacking in independence, in breach of the rules of Natural Justice, in breach of the principles of judicial independence, ultra-vires thus null and void ab initio.
4. A Declaration that the Petitioner is entitled to and as such, have an indefeasible right of access to information from the 1st Respondent in terms of Article 35.
5. A Declaration that Sections 34(1), (3) and (4) of the Ethics and Anti-Corruption Act (No. 12 of 2011) are unconstitutional as they contravene express provisions of Section 31(1) and (2) of the Sixth Schedule of the constitution as read together with Article 2 of the constitution of the Republic of Kenya.
6. A declaration that the 1st and 2nd Interested Parties acted illegally and violated article 79 (as read together with Article 250 (1)) of the constitution by carrying out the vetting exercise and undertaking substantive decisions contrary to the express provisions of the constitution regarding the membership and formation of the 1st Respondent.
7. A Declaration that the 1st and 2nd Interested Parties are in office illegally as they were appointed by a non-existing Commission and thus had no authority to vet the Petitioner.
8. An order directing the 1st Respondent to properly fill in the positions of the Secretary/ Chief Executive Officer and the Deputy Director - Operations currently held by the 1st and 2nd Interested Parties.
9. An order compelling the Respondents to unconditionally reinstate the Petitioner to his employment without loss of status, salary (including back pay), position or benefits.
10. A finding and declaration that the employment service of the Petitioner was unprocedurally and unfairly terminated.
11. An order that the Petitioner are entitled to compensation by way of damages for violations under Articles 23, Article 27(1), Article 27(2), Article 27(4), Article 28, Article 29(f), Article 31 (C), Article 31(d), Article 35. (1)(a), Article 35(1)(b), Article 41(1), Article 41(2)(a), Article 43(1)(e), Article 47(1) Article 48 and Article 50 of the constitution taking into account damages for loss of office, career stagnation, injury to reputation and loss of future income.
12. A declaration that the Petitioner is additionally entitled to the benefits and special damages enumerated below –
 - a) 12 months' salary for unfair termination
12 x 297,106 Kshs.3,565,272
 - b) Unpaid salary to the age of retirement age of 60 years
297,106 x 12 x 19 years to retirement Kshs.67,740,168
 - c) Unpaid leave allowance until retirement
25,000 x 19 years Kshs.5,700,000

d) Unpaid medical cover until retirement

1,700,000 x 19 years Kshs.32,300,000

e) Underpaid 3 months' salary in lieu of notice

297,106 x 3 Kshs.891,318

f) Unpaid employer's contribution to NSSF until retirement

200 x 19 x 12 years Kshs.45,600

Total Kshs.110,332,358

13. An order directing the 1st Respondent to issue certificates of service to the Petitioner.

14. A declaration that the 1st Respondent acted illegally in purporting to vet and subsequently terminate the employment services of the Petitioner who was on contract with the Public Service Commission through the Ministry of Justice, National Cohesion and Constitutional Affairs and the decision thereof was unlawful and of no legal effect thereof

15. A permanent injunction do issue restraining the 1st Respondent by itself or by its agents, servants, employees officers or whomsoever so acting on its behalf from terminating the Petitioners' employment on the basis of the flawed vetting exercise.

16. Costs of this suit.

17. Interest at court rates from the date of filing until payment in full.

18. Such other further or better relief or Orders as the Court shall deem just and fit to grant.

The petitioner named the Attorney General as the 2nd respondent pursuant to the provisions of Article 156 of the Constitution in his capacity as the principal legal advisor of the government.

The 1st and 2nd Interested Parties are enjoined as the Chief Executive Officer/Secretary and Deputy Chief Executive Officer/Deputy Secretary of the 1st respondent respectively.

The specific constitutional violations as set out in the petition are the following –

- a) Equality and freedom from discrimination – under Article 27.
- b) Human dignity Article 28.
- c) Treatment or punishment in a cruel, inhuman or degrading manner Article 29(f).
- d) Privacy articles 31(c) and 31(d).
- e) Nondisclosure of material facts (right to information)
- f) Labour relations Article 41
- g) Failure and or refusal to set up appropriate vetting process
- h) Right to social security Article 43(2)(e)
- i) Fair Administrative Action
- j) The effects of the respondents and Interested Party's actions

The petitioner contends that as a result of the violations the respondents –

- i. Denied the petitioner access to justice contrary to Article 48 of the Constitution by the refusal to give him reasons for the decisions.
- ii. Failed to set up mechanisms to protect the Petitioner from exploitation and complaints by persons who they may have been investigating or charged for corruption.

- iii. Failed to follow the existing human resource manual.
- iv. Failed to put in place mechanisms to allow a proper review of the decisions of the Vetting Panels.
- v. Failed to provide complaints and whistle blowing mechanisms

The petitioner further avers that the 1st respondent violated the following international instruments –

- (a) Universal declaration on Human Rights (UDHR)
- (b) The International Convention on Civil and Political Rights
- (c) The convention against torture and other cruel, inhuman or degrading treatment or punishment.
- (d) The African Chamber on Human and Peoples' Rights.
- (e) The International Labour Organisations Convention No. 1110 on Discrimination (Employment and Occupation), Convention 1958 and Convention No. 158. Termination of Employment Convention 1984, Convention No. 173, Protection of Workers Claims (Employers Insolvency) Convention, 1992.

The petitioner further avers that the vetting and subsequent termination of his employment was illegal as the 1st respondent was not properly constituted as provided under Section 9, Schedule 2 of the Ethics and Anti-Corruption Commission Act and under Article 250(1) of the Constitution on gender balance.

The petitioner further took an issue with the vetting rules, which he contends were never subjected to any public or petitioner's participation contrary to the letter, spirit and intention of the Constitution and the Ethics and Anti-Corruptions Commission Act. The petitioner avers that the vetting panel was handpicked and self-serving, that he had no real chance of appeal or review as the same individuals sat on both panels. He further contends that there was not fairness and impartiality, that no reasons were given for the decision to vet him out, that he was vetted out on contested accusations. The petitioner avers that he was targeted by the Vice Chairperson and the 2nd Interested Party who he alleges was protecting outsiders under investigation on land corruption and thus there was conflict of interest.

In his written submissions, the petitioner reiterates that the 1st respondent was not properly constituted citing the decisions of the Court of Appeal in **MICHAEL SISTU MWAURA KAMAU -V- ETHICS AND ANTI-CORRUPTION COMMISSION & 4 OTHERS (2017) eKLR** and **CHARITY KALUKI NGILU -V- ETHICS AND ANTI-CORRUPTION COMMISSION & 4 OTHERS (2017) eKLR**.

The petitioner further submitted that the vetting process was unfair, that no reason were given for the decision hampering his ability to apply for review of the decision, that employees were vetting fellow employees contrary to the provisions of the Vetting Manual and that the accusations against him were uncontested. He relied on the decision in the case of **IMMANUEL MASINDE OKUTOYI & 2 OTHERS -V- NATIONAL POLICE SERVICE COMMISSION AND ANOTHER (2017) eKLR**.

On violations of the Employment Act, the petitioner submitted that his letter of termination did not state the reasons for termination and that the 1st respondent violated the provisions of Section 41, 43(2) and 45(1), (2) and (4).

On constitutional interpretation, the petitioner submits that it is the duty of the court to be progressive, that the intention of the framers of the Constitution must be discerned and exposed and that the court should bear in mind any interpretation that advances the applicability of rights and freedoms. The petitioner relied on the decision in the case of **FEDERATION OF WOMEN LAWYERS (KENYA) (FIDA – KENYA) AND 5 OTHERS -V- THE ATTORNEY GENERAL & ANOTHER**.

The petitioner further submitted that he was discriminated by the 1st respondent in recommending the vetting and subsequent termination of his employment while similar demands were not made on other public and civil servants. He submitted that this was violation of Article 27 of the Constitution on equality and freedom from discrimination. He relied on the case of **RM & ANOTHER –V- ATTORNEY GENERAL (2008) I KLR** and the case of **FIDA (KENYA)** (supra). He further relied on the case of **NYARANGI & 3 OTHERS –V- ATTORNEY GENERAL (2008) KLR 633**.

The petitioner also submitted that the respondent treated, exposed and violated his rights to fair labour practices by stating he was unfit to hold office. He relied on the case of **MUEMA -V- ATTORNEY GENERAL & 2 OTHERS (2006) I KLR 398**.

The petitioner submitted that the respondents failed and/or refused to set up appropriate administrative mechanisms relying on the case of **MSAGHA –V- CHIEF JUSTICE & 7 OTHERS (2006) 2 KLR 553**.

The petitioner submitted that there was confusion and secrecy surrounding the vetting, that the respondents fraudulently withheld the reason leading to the termination of the petitioner employment thus violating his right to information guaranteed under Article 35. He relied on the case of **FRANCIS OMONDI OKONYI -V- NATIONAL POLICE SERVICE COMMISSION (2016) eKLR**.

Although the petitioner submitted a list of 26 authorities in support of the petition, only three were submitted to court. These are –

1. Michael Sistu Mwaura Kamau -V- Ethics & Anti-Corruption Commission & 4 Others (2017) eKLR.

2. Charity Kaluki Ngilu -V- Ethics & Anti-Corruption Commission & 4 Others (2017) eKLR.

3. Immanuel Masinde Okutoyi & Others -V- National Police Service Commission & Another (2017) eKLR.

In answer to the petition, the 1st respondent filed a replying affidavit of MICHAEL MUBEA, the 2nd Interested Party and submission.

Mr. Mubea deposed that vetting was a requirement for all employees to be retained in the commission in the wake of the Constitution 2010 and the Ethics and Anti-Corruption Commission Act, 2011, that the objective of the vetting was to attract and retain employees of integrity, honesty and high professional and ethical standards. He deposes that all staff members were notified and a schedule of the vetting exercise sent to them, that before the petitioner underwent the vetting exercise he was availed all complaints raised against him, and afforded adequate opportunity, time and facilities to prepare a defence, just like all other employees. He submitted that the Internal Vetting Policy procedures guideline provided for review within 7 days of notification of the outcome of the vetting by any employee who was dissatisfied with the vetting decision.

It is deposed that the petitioner did not raise any indication that he was dissatisfied with the decision or process and on 18th April 2013, about 3 weeks after his services were terminated, the claimant smoothly handed over to the officer in-charge of EACC Eldoret Regional office. He deposes that by so doing the petitioner effectively waived his rights to review and the right to be given written reasons for his termination without duress, coercion, intimidation or undue influence. That the petitioner is thus caught up by the equitable doctrine of waiver and laches.

He deposes that the 1st respondent was surprised by the petitioner's change of mind when he filed the petition 3 years later.

The 2nd respondent, the Attorney General filed grounds of opposition dated 3rd November 2016 and written submissions.

In both the grounds of opposition and the submissions, it is the 2nd respondent's contention that under Article 253 of the Constitution, the 1st respondent is a body corporate with capacity to sue and be sued in its own name, that the 2nd respondent holds a constitutional office with a definite mandate and duties and has been misjoined to these proceedings. The 2nd respondent submitted that under Article 156(4)(b), its mandate is to represent the National Government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings. That under Section 31 of the Ethics and Anti-Corruption Act, the commission may request the Attorney General to provide legal counsel/advise but in the instant case the Commission has not done so. Further that the 2nd respondent may apply to the court to be enjoined as a friend of the court which it has not been sought in these proceedings.

The Attorney General prayed to be struck out or discharged from being a party in the instant petition.

The 2nd respondent further submits that the allegations of infringement of the petitioner's rights are baseless as there is no documentary evidence to support the allegations, that the application is frivolous, vexatious and an abuse of court process and should be dismissed.

The petition was disposed of by way of written submissions.

Determination

I have considered the petition together with the petitioner's affidavit in support thereof. I have also considered the replying affidavit of the 1st respondent and the Interested Parties, the grounds of opposition filed by the 2nd respondent and the submissions by all the parties. The issues arising for determination are the follows-

1. Whether there has been a misjoinder of the 2nd respondent.
2. Whether the vetting of the petitioner and staff of the Ethics and Anti-Corruption Commission was illegal by virtue of the Commission not being properly constituted.
3. Whether the petitioner was discriminated.
4. Whether the petitioner was not given an opportunity to challenge the decision of the vetting panel.
5. Whether the petitioner is entitled to the prayers sought.

1. Whether there is misjoinder of the 2nd respondent

As submitted by the respondent, the 2nd respondent is a body corporate with capacity to sue and be sued in its corporate name. On the other hand the 2nd respondent can only become involved to a suit against the 1st respondent if invited by the 1st respondent to represent it, thus appearing as counsel for the respondent, or if it applies to the court to be enjoined as amicus. It can therefore not be joined as a party except under the two circumstances.

I agree with the 2nd respondent that there has been a misjoinder. For this reason, I discharge the 2nd respondent from any liability under these proceedings.

Validity of Vetting

The petitioner contends that the vetting of staff of the 1st respondent including himself was illegal for reasons that it was not properly constituted relying on **MICHAEL SISTU MWAURA KAMAU -V- ETHICS AND ANTI-CORRUPTION COMMISSION AND 4 OTHERS (2017) EKL.R.** Those cases are distinguishable from the instant petition as the petitioners were challenging the powers of the Commission and those of the Commissioners. The cases were dealing with investigations and recommendations for criminal charges and the court correctly held that in such cases the secretary cannot bypass the Commissioners and report or make recommendations directly to DPP.

The petitioner's vetting was pursuant to Section 34(3) and (4) of the Act which required every person in the employment of the Commission to apply a fresh and be vetted as a condition to continue in employment. Section 34(3) and (4) provide as follows –

(3) Notwithstanding subsections (1) and (2), and before appointing or employing any member of staff of the Kenya Anti-Corruption Commission who wishes to work for the Commission, the Commission shall—

(a) require such a person to make an application for employment or appointment to the Commission; and

(b) using the criteria determined by the Commission, vet such a person to ensure that he or she is fit and proper to serve in the position applied for as a member of staff of a Commission.

(4) An applicant who fails to meet the vetting criteria under subsection (3) shall not be employed or appointed by the Commission and the services of such applicant with the Commission shall be terminated in accordance with the terms of the contract of employment.

The petitioner however faults the vetting on grounds that the Commission did not have Chairperson at the time and had only two Commissioners when the Constitution provides for a minimum of 3, that the two were of the same gender contrary to this EACC Act gender requirements in the Constitution and in the Act, that the Commissioners were yet to take the oath of office and were in office illegally. The petitioner further avers that the vetting rules were not subjected to public participation, that members of the internal committee were handpicked to serve ulterior motives and the same panel was used for vetting and for appeals.

Unfortunately, the petitioner did not submit evidence in support of any of these averments. The only documents that the petitioner has attached to his affidavit are the letter of termination, the vetting guidelines and the timetable for Panels A and B. These documents do not support all the averments made by the petitioner.

On the issue of fair termination, I agree with the petitioner that his letter of termination does not give any reasons for the termination. The 2nd Interested Party has in the replying affidavit admitted that the petitioner was not given reasons for termination but contends that it is because the petitioners did not ask for it and waived his right to be given the reasons when he failed to appeal against the termination.

Even though Section 34(4) of EACC Act authorised the 1st respondent to terminate the employment of an employee who does not meet the vetting criteria, the Act states the termination shall be “*in accordance with the terms of the contract of employment.*”

The petitioner being an employee was entitled to the protections under Section 41 and 43 of the Employment Act. He was entitled to know which allegations had been made against him, what the evidence against him was, what his defence to the allegations were and the reasons why the vetting panel reached the decisions that it did. It is only after being supplied with these details that the petitioner would be in a position to make an informed decision whether or not to appeal against the said decision.

Further, the 1st respondent did not deny that the vetting panel was the same one that considered reviews and/or appeals from its own decision. I therefore take it that this was the position in the absence of such denial. It would therefore have been foolhardy for the petitioner to appeal to the same panel that dismissed him.

The petitioner's allegations of discrimination only because other public servants were not subjected to vetting is not a valid reason. It is common knowledge that Judges and Magistrates were taken through vetting process and that the police were also taken through vetting. Further, the vetting is provided for by statute. As was stated by the court in the case of **GIDEON MWANGANGI WAMBUA & ANOTHER -V- IEBC & 2 OTHERS**, a court must begin from the presumption that legislation is constitutional and a party challenging the legislation must rebut that presumption. The petitioner did not rebut that presumption and neither do I find Section 34 of the EACC Act offensive to the provisions of the Constitution.

Conclusion

For the foregoing reasons I find the termination of the petitioner's employment to have been unfair for the reasons stated.

Remedies

I award him compensation equivalent to 12 months' salary. The 1st respondent will pay his costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE