



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 107 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER 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 THE NON-GOVERNMENTAL ORGANISATIONS COORDINATION ACT (CAP 19) OF 1990

THE LEADERSHIP AND INTEGRITY ACT NO. 29 OF 2012

PUBLIC OFFICER ETHICS ACT CAP 183

IN THE MATTER OF MWONGOZO (CODE OF GOVERNANCE FOR STATE CORPORATIONS)

BETWEEN

JOSEPHINE NGATIA.....PETITIONER

VERSUS

EXECUTIVE DIRECTOR OF THE NON-GOVERNMENTAL

ORGANISATION CO-ORDINATION BOARD....1ST RESPONDENT

NGOs CO-ORDINATION BOARD.....2ND RESPONDENT

JUDGMENT

The petitioner was until her summary dismissal on 11th November 2016, the Human Resources and Development Manager of the 2nd respondent, NGOs Co-ordination Board, a public body responsible for regulating the registration and conduct of nongovernmental organisations in Kenya. The 1st respondent is the Chief Executive Officer of the 2nd respondent. On 18th July 2016, the 1st respondent circulated an email informing the 2nd respondent’s management staff about the transfer of the petitioner to Head the Garissa Regional office with immediate effect. She was to report to the office on 1st August 2016.

Unhappy with the transfer the petitioner filed the petition herein alleging that the transfer violated Articles 10, 73 and 75 of the Constitution. She sought the following reliefs –

- a) A declaration that the 1st Respondent has violated Article 10, 73, and 75 by not acting in accordance with the Law
- b) A declaration that the decision by the 1st Respondent to transfer the Petitioner is unconstitutional

c) An order quashing the transfer of the Petitioner by the 1st Respondent.

d) Any other order the court may deem fit towards the ends of justice.

Together with the petition the petitioners filed a notice of motion under certificate of urgency seeking the following orders –

1. That the application be certified urgent and be heard ex parte in the first instance.
2. The service of the application be dispensed with in the first instance.
3. The Petition be fast tracked, heard and determined within the month of August.
4. In the first instance pending the hearing and determination of this application, the court be pleased to issue an injunction stopping the transfer of the applicant to Garissa
5. Pending the hearing and determination of the petition, the court be pleased to issue an injunction

The grounds in support of the application were the following –

1. The 1st Respondent failed and or ignored to follow due procedure of transferring senior staff in coming up with the decision.
2. The 2nd respondent is the only one mandated with the promotions and transfers of the senior staff members as embodied in the organization's Human Resources Policy and the 1st respondent had no power to make such decisions on his own
3. The applicant should not be penalized for trying to carry out her constitutional duties
4. That the Applicant is a single mother and sole breadwinner of the family and has an asthmatic daughter who is preparing for her Kenya primary national examinations and the transfer will not make it possible for the daughter to do her national examination.
5. That the 1st Respondent has denied the applicant her leave days without any solid reasons for the denial.
6. That the 1st respondents aim in ordering the transfer is to prevent the applicant from presenting evidence regarding the 1st respondent's fitness to hold the office of the Executive Director of the NGOs Coordination Board-an issue that is currently subject to a constitutional petition before the court.
7. That this is a suitable case for the exercise by the Court of its unfettered discretion to set aside the exparte judgment.

In her affidavit in support of the application and petition, the petitioner laments that she was a victim of the 1st respondent's excessive use of power, that the 1st respondent had made threats to her following her appearance before the Ethics and Anti-Corruption Commission and CID following allegations against the 1st respondent concerning his academic credentials.

The court heard the application and granted an injunction stopping the transfer of the petitioner to Garissa.

The application was later heard inter partes and ruling delivered on 22nd September 2016 confirming the earlier orders stopping the transfer of the claimant.

The petitioner was on 5th September 2016 served with a show cause letter to explain her absence from duty from 13 days in August 2016. She was required to respond within 48 hours.

In her response, dated 6th September 2016 the petitioner denied that she absented herself from work without permission. She explained the reasons why she had been absent, which absences she explained were with permission from the Deputy Executive Director.

On 22nd September 2016 after the ruling on her application dated 29th July 2016, the 2nd respondent withdrew the letter of transfer. On 23rd September 2016 she received a letter of suspension from duty and on 29th September 2016, the petitioner filed another application seeking the following orders –

1. That this application be certified urgent and be heard ex parte in the first instance.
2. That the service of this application be dispensed with in the first instance.
3. The 1st and 2nd Respondents have been in contempt of the Court Order given on 31st August 2016 by the Honourable Judge Nderi Nduma as he refused and neglected to grant access to her workstation.
4. That an order be issued for the 1st Respondent to unconditionally lift the suspension of the Applicant from her employment and

order her immediate reinstatement as a Human Resource and Development Manager of the NGOs Co-ordination Board.

5. That the 1st Respondent be restrained from continually harassing, victimizing and intimidating the Applicant in her course of employment.
6. That an order be issued compelling the 1st Respondent to grant the applicant full access to her office, computer, computer accounts, working desk, access to the cabinet that contains the human resource files and all other working tools to enable her run her office smoothly.
7. That costs be in the cause.

Before the application could be determined the petitioner was summarily dismissed from service. Following the dismissal the petitioner sought and was granted leave to amend her petition dated 9th February 2017. In the amended petition, she seeks the following reliefs –

- a) A declaration that the 1st respondent has violated Article 10, 73, and 75 by not acting in accordance with the law
- b) A declaration that the decision by the 1st respondent to dismiss the Petitioner is unconstitutional
- c) A declaration that the termination of the claimant's employment was unfair
- d) Compensation for unfair dismissal
- e) An order of reinstatement of the Petitioner
- f) Any other order the court may deem fit towards the ends of justice.

In response to the petition, applications and amended petition, the respondents filed an application dated 15th August 2016 seeking to set aside or vary the orders of 1st August 2016 stopping the transfer of the petitioner. The application is supported by the affidavit of LINDON NICOLAS OTIENO sworn on 15th August 2016. The respondents filed a further affidavit of the said LINDON NICOLAS OTIENO sworn on 30th March 2017.

In sum, the respondents aver that the petitioner absented herself from duty without permission in breach of the respondent's Human Resource Manual Clause 10.3, that the petitioner appeared before the Finance and Administration Committee for disciplinary hearing accompanied by her lawyer, that the disciplinary hearing was fair and just as the petitioner presented her case both orally and through written submissions. That she however failed to provide evidence that she attended work during the days in question and that her allegations of victimization was found to be without basis. That after considering her case the committee found that the petitioner had no permission to proceed on leave, that the petitioner was summarily dismissed on 11th November 2016 for gross misconduct and was advised of her right of appeal as provided in the manual.

The respondents relied on the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** where Mbaru J. held that –

“Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee. It is now established best practice to allow for an appeal to such an employee within the internal disputes resolution mechanism and with due application of the provisions of section 5(7) (c) of the Employment Act. Where this procedure is followed an employer would have addressed the procedural requirements outlined under section 41 and any challenge that an employee may have would be with regard to substantive issues only.”

The respondent also relied on the South African case of **Nampak Corrugated Wadeville –V- Khoza (JA14/98) [1998] ZALAC 24** where it was held that:

“A court should therefore not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable.”

The respondent further relied on the South African case of **Peter Kamwi –v- Standard Group Limited [2016] eKLR** where it was held that –

“Section 41 thereof has now created a statutory obligation upon employers to notify and hear representations from employees when contemplating termination of the employment contract. This is what is called natural justice under the common law. In the employment and Industrial relations, this is known as procedural fairness. Dismissals pursuant to section 44 of the Employment Act are also subjected to the requirements of procedural fairness set out in section 41 of the Act.

However, the radical change is not only in the field of procedural fairness. There must be substantive fairness. An employer may comply

with all the procedural fairness conditionality yet fail to meet the threshold requirements of substantive fairness set out in section 45 and 46 of the Employment Act. An employer is now expected to prove the validity and fairness of the reasons for termination. The question this Court has to address therefore is whether the Respondent complied with the peremptory requirements of procedural fairness before making the decision to terminate the services of the Claimant through summary dismissal.”

The respondents also relied on the decision by GBM Kariuki J. in **Civil Appeal No. 50 of 2014 Judicial Service Commission v Gladys Boss Shollei & Another [2014] eKLR**, where the learned Judge held that –

“In view of this, the Industrial Court was bound by the Supreme Court decision in Mumo Matemu V Trusted Society of Human Rights the case of ANARITA KARIMI set the threshold to be met in a petition alleging constitutional violations and opined that it should define the dispute to be decided by the court and plead with particularity and reasonable precision on the provisions breached and the nature or manner of the breach alleged or complained of.”

The respondents further submitted that the petitioner has made wild sensational accusations against the 1st and 2nd respondents claiming to have been harassed and victimized without tendering any credible evidence before the Court.

That issues involving an earlier application seeking to stop the Petitioner’s transfer is not and has never been in issue once this court adjudicated upon it and issued its orders. That the Respondents immediately obeyed the court’s ruling delivered on 22nd September 2016 and withdrew the Petitioner’s transfer to the Respondent’s Garissa office with immediate effect on the same day when this court delivered its ruling.

The respondents prayed that the court dismisses the amended petition and uphold the decision to summarily dismiss the Petitioner.

Determination

I have considered the pleadings, the evidence adduced in court by the claimant and her witness ANDREW OKEDO OGOMBE (CW2) who was the Deputy Executive Director of the 2nd respondent. I have further considered the respondent’s witness statement of LINDON NICHOLAS OTIENO, which was adopted by consent of parties as his evidence. I have further considered the written submissions filed and exchanged by the parties.

The issues for determination are the following –

- 1) Whether there was valid reason for summary dismissal of the petitioner.
- 2) Whether the petition was victimised by the 1st respondent.
- 3) Whether the 1st respondent violated Articles 10, 73 and 75 of the Constitution.
- 4) Whether the petitioner is entitled to the remedies sought.

Whether there was valid reason for dismissal of the Petitioner

The reason advanced by the respondent for the suspension and subsequent dismissal of the petitioner was that she absented herself without permission for 13 days in August 2016. The petitioner and her witness both testified that she did not absent herself without permissions and that whenever the petitioner was late, she notified CW2 who was the Deputy Executive Director and her immediate supervisor.

In the witness statement of LINDON NICOLAS OTIENO it is stated that on 1st September 2016 the 1st Respondent received an internal memo from one of its officers in the Human Resource Department which informed them that the Petitioner failed to report to work on several occasions on the following dates: 2nd, 10th, 12th, 17th, 18th, 19th, 23rd, 24th, 25th, 26th, 29th and 30th all in the month of August, 2016 when the temporary injunctive orders were in place.

That the Petitioner wilfully absconded duty and knowingly stayed away from the office without any lawful permission on several different occasions during the pendency of the interim orders. This prompted the Respondent to issue a notice to show cause on 5th September 2016 as to why disciplinary action should not be taken against her.

The claimant testified that the internal memo could not have been written by the alleged officer who was at that time on study leave and would not have been aware of the petitioner’s absence. The officer who is alleged to have written the memo was not called to give evidence even though the petitioner had contested the authorship of the memo. The evidence in the witness statement of LINDSON was also not subjected to cross-examination.

I find that the respondents did not prove the reason for dismissal of the petitioner and the dismissal was therefore unlawful and unfair.

Whether the petitioner was victimised

The petitioner explained in her testimony that prior to receiving the letter of transfer, she had been called by EACC to testify on the 1st Respondent’s academic credentials as it was alleged that he did not have the right academic qualifications as the CEO of the 2nd Respondent.

The Petitioner had also refused to certify copies of the 1st Respondent's academic papers as she was not sure of the authenticity thereof. That it is on this premise that the 1st Respondent started off a series of events to harass, intimidate and punish the petitioner. That he wanted to get rid of her to prevent the EACC from seeking any information from her. He then started by transferring her, which the Petitioner challenged under certificate of urgency and the court gave orders stopping the said transfer. She testified that on reporting back to her usual workstation, the 1st Respondent denied her access to her workstation including her computer and emails in a bid to frustrate her.

The Petitioner testified how she then received a notice to show cause dated 5th September 2016 after she successfully challenged her transfer in court. The Notice to Show Cause was premised on misplaced allegations that she had absconded duty. She promptly responded to the Notice to Show Cause vide a letter to the 1st Respondent dated 6th September 2016. In the meantime, the court proceedings regarding the application stopping transfer continued and on 22nd September 2016, the court issued a ruling restraining the Respondents from transferring the Petitioner to Garissa pending the hearing and determination of the petition. Immediately after the Ruling and as a direct response to the same, the 1st Respondent issued the Petitioner two letters one dated 22nd September 2016 withdrawing the transfer and another one dated 23rd September 2016 suspending the Petitioner from employment. She was summoned to appear before the finance and administration committee for a disciplinary hearing on 11th November 2016. The petitioner testified that she pointed out her concerns about the composition of the committee. That the committee was not properly constituted as the composition was the 1st Respondent who was her accuser, a board member who had dealt with the matter previously and one other board member. She testified that immediately after she left the boardroom, an email was circulated to all members of staff notifying them that she was no longer an employee. She later received a letter summarily dismissing her for gross misconduct.

The Petitioner testified that the ground used in dismissing her was 'absconding duty' yet at no one time had she ever absconded duty. She explained how leave was approved and at all material times the Deputy Director (her immediate supervisor) was always aware whenever she did not report to work or whenever she reported late. She testified that she had no disciplinary issues whatsoever in her employment record.

The Petitioner's testimony was corroborated by her witness, Andrew Ogombe. He testified how the 1st Respondent intended to transfer the Petitioner without consulting him yet he was the immediate supervisor of the petitioner and how upon service of the order stopping transfer, the 1st Respondent blatantly refused to grant the petitioner access to her workstation. He further corroborated the Petitioner's evidence on the events that followed including suspension culminating in dismissal. The witness further testified that he was the immediate supervisor of the Petitioner and was therefore conversant with her work and work ethics. He stated he was not involved or called to shed light on the allegations regarding the Petitioner and as a result he stated that no proper investigations if any, were carried out by the respondents regarding the suspension and subsequent dismissal of the petitioner. He further testified that the 1st Respondent had a habit of victimizing employees who questioned or disagreed with any of his actions or conduct.

These averments were not rebutted by the respondents.

It is evident from the foregoing that the dismissal of the claimant resulted from her refusal to go on transfer and the decision of the court in her favour stopping the transfer. It is further evident that the transfer resulted from the petitioner's refusal to certify the 1st respondent's suspect copies of academic certificates and her appearance before EACC to record a statement in respect of the certificates.

From the foregoing, I find that the petitioner was victimised by the 1st respondent.

Whether the 1st respondent violated Articles, 10, 73 and 75 of the Constitution

Article 10 of the Constitution provides for national values and principles of governance. Article 73 provides for resp

Although the conduct of the 1st respondent may have been hostile towards the petitioner, the petitioner did not adduce sufficient evidence to enable the court make a finding of violation of Articles 10, 73 and 75 of the Constitution.

The prayer is therefore dismissed.

Whether the petitioner is entitled to compensation for unfair dismissal

I have already found that the petitioner was unfairly dismissed and that she was victimised. Taking into account the petitioner's length of service and the manner in which her employment terminated, further taking into account her legitimate expectations after her long clean service, it is my opinion that she deserves maximum compensation of 12 months' salary which I award her at Kshs.2,534,563.80.

Reinstatement

Compensation and reinstatement are alternative remedies for unfair termination. Having awarded the petitioner compensation as prayed and further taking into account the circumstances under which her employment was terminated, I do not think reinstatement is a viable remedy. The prayer is declined.

Conclusion

In conclusion, I find the dismissal of the petitioner unfair. I further find that she was victimised by the 1st respondent. I however do not find any violation of the constitutional provisions cited by the petitioner. I award the petitioner Kshs.2,534,563.80 as compensation for unfair termination. The respondents shall pay the petitioner's costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE