



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

PETITION NO. 5 OF 2017

(Before D. K. N. Marete)

DR. ALPHONSE OMONDI OTIENOPETITIONER

VERSUS

THE UNIVERSITY OF KABIANGA.....1ST RESPONDENT

PROF. ERICK KOECH.....2ND RESPONDENT

P.K. KIMALEL.....3RD RESPONDENT

PROF. ISSA MWAMZANDI.....4TH RESPONDENT

DR. NAAMAN ROP.....5TH RESPONDENT

JUDGEMENT

This matter came to court by way of a Petition dated 3rd April, 2017. It seeks relief as follows;

a) Pending the hearing and determination of this petition conservatory orders be issued in terms of the Notice of Motion filed herewith.

b) A declaration that the Disciplinary proceedings of Monday 13th February, 2017 are flawed, manifestly unreasonable and violates the petitioner's rights inter alia their right to a fair administrative action and therefore null and void ab initio.

c) A declaration that the Respondents have violated the petitioner's rights to human dignity under Articles 28 of the constitution and the right not to be subjected to any form of violence or be treated in a cruel, inhuman or degrading manner under article 29(c) and (f) of the constitution.

d) A declaration that the 1st, 2nd and 3rd Respondents have violated the petitioner's right to equal benefit of law under Article 27 of the constitution, right to a fair administrative action under Article 47 of the constitution and the right to access justice under Article 48 of the constitution.

e) An order for judicial review to quash any decision of the 1st, 2nd or 3rd respondents made pursuant to flawed, biased and unreasonable Disciplinary proceedings and/or recommendations made pursuant to the proceedings of Monday 13th February, 2017.

- f) *An award of damages for pain and suffering, humiliation and distress visited upon the petitioner.*
- g) *An award of special damages totaling Ksh 137,251.5/= (deducted salaries during the interdiction period) and that the same paid inclusive of the salary arrears and increase approved in March, 2017.*
- h) *Costs incidental to this Petition.*
- i) *Any other or further relief that this Honourable Court considers appropriate and just to grant.*

The respondents, who opted to combine their response with written submissions opposed the claim. It is their defence that the petitioner was involved in various disciplinary issues with his employer as follows;

1. *Inciting students to march to the Vice-Chancellor's office.*
2. *Inciting said students not to accept an address from anyone other than the Vice-Chancellor.*
3. *Failing to teach students,*
4. *Being unruly and disobedient to the Acting Deputy Vice-Chancellor.*

The petitioner cites the Constitution as the forerunner of his fundamental rights and also that this rights have been violated by the respondents severally in their conduct and disciplinary proceedings in this cause.

The petitioner bases the petition on Articles 2, 19 (2) and 3, 20 (1), (2) and (3) (b), 159 (a) and (b), 22 (1), 23 (3) all of which direct the acquisition of fundamental rights by persons including the method of seeking, enforcement and grant of such rights. Again, the petitioner enlists his rights as enunciated under Articles *inter alia* 27, 28, 29 (c) and (f), 43, 47 and 48 of the Constitution. The petitioner disagrees with the conduct of the respondent's disciplinary proceedings and the eventual outcome and prays that this be annulled for being a violation of his rights as set out.

It is the respondent's case that complaints were received by the 2nd respondent on the misconduct of the petitioner. He then proceeded to issue a show cause letter to the petitioner dated 24th October, 2016. In a letter dated 7th December, 2016, the petitioner replied to the show cause letter but failed to raise a satisfactory cause as to why disciplinary action should not be taken against him. He was interdicted pending investigation and hearing of his case.

The petitioner was invited for a hearing before a Disciplinary Committee in a meeting held on 13th February, 2017 where he was accorded a fair hearing and produced one witness. The petitioner was, upon hearing, found guilty on all allegations against him and was informed of the results. He was however reinstated conditionally after consideration mitigating factors. He was thereon expected to sign the reinstatement letter and forward the same to the 1st respondent upon which he would collect his dues and resume work. He declined and filed this petition.

The issues for determination are;

1. Whether there is indeed a violation of the claimant's fundamental rights arising out of the respondent's disciplinary proceedings.
2. Whether the claimant is entitled to the relief sought.
3. Who bears the costs of this petition.

The 1st issue for determination is whether there is indeed a violation of the claimant's fundamental rights arising out of the respondent's disciplinary proceedings. When this matter came for hearing on 25th

September, 2017, the petitioner testified in reiteration of his case for breach of his fundamental rights and freedoms. It was his further testimony that his interdiction was unlawful *ab initio* and should be nullified so as to facilitate a payment of remuneration and other dues amounting to Kshs.700,000.00.

This petition is from the onset a fumbled up attempt at relief which does not indeed exist. The petitioner desperately tries to lay down a case of breach of fundamental rights but this ends up at that – *alleged breach*. It is not in any way established or demonstrated in evidence. On the contrary, the respondent establishes a case of misconduct at the workplace which misconduct was administered through an effective disciplinary process involving the petitioner. This process came out with a humane end product offering the petitioner conditional reinstatement to employment which he has so far not taken up. Is this his idea of breach of fundamental rights?

Fundamental rights and freedoms are not abstract. They exist and operate in time and space. No amount of citation of breach of such rights would install these in the absence of a demonstrable case of such breach and therefore the need to forestall the same. Here, the petitioner loudly sings a song of breach. This is not enough. He must be able to practice the soundness of such breach. I therefore find a case of no violation of fundamental rights and freedoms and leave the petitioner's case hanging - as is deserved.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. Far from it. Having lost on a case of breach of fundamental rights, he loses it all.

I am therefore inclined to dismiss the petition with orders that each party bears their own costs of the petition.

Delivered, dated and signed this 4th day of December, 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Petitioner in person.
2. Mr.Mutai instructed by Chelule & Company Advocates for the respondents.