



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

PETITION NO. 6 OF 2015

IN THE MATTER OF ARTICLE 22(1) & (23(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 41(1) AND ARTICLE 50(1) & (2) OF THE CONSTITUTION OF KENYA

BETWEEN

PROF. KIAMA WANGAI

PETITIONER

v

EGERTON UNIVERSITY

RESPONDENT

JUDGMENT

1. Prof. Kiama Wangai (Petitioner) filed the instant Petition against Egerton University (Respondent) on 2 July 2015 alleging violation of his fundamental rights and freedoms.
2. Simultaneously filed with the Petition was a summons under certificate of urgency seeking stay of disciplinary proceedings which had been commenced by the Respondent against him.
3. The summons was certified urgent and it was fixed for *inter partes* hearing on 3 July 2015. However, the Respondent sought more time to file its responses. Pending the filing of the responses, the Court stayed the pending disciplinary process which had been scheduled for that afternoon. The *inter partes* hearing was adjourned to 27 July 2015.
4. However, the application could not take off on 27 July 2015 because the Respondent had only served the Petitioner that morning.
5. During the next appearance on 21 October 2015, the Respondent suggested that the Petition be disposed off through the record and written submissions. The Court therefore gave timelines for exchange of submissions which were highlighted on 18 November 2015.
6. Before examining the merits of the Petition, some background would be in order.
7. On 21 September 2011, the Dean, Faculty of Health Sciences invited the Petitioner to a meeting called for 22 September 2011 at the Faculty Town office. The invitation letter advised the Petitioner that the agenda of the meeting would be tabled on the floor.
8. The minutes of the meeting indicate that 4 agenda were placed before the meeting and these were *conduct of staff, sexual harassment, conduct of examinations and student complaints*.
9. The Petitioner was part of the staff discussed at the meeting (though he was not present) and the meeting recommended that he be referred for disciplinary action and that scripts of students who had failed in his subject be remarked (the copies of minutes filed by both sides are missing a page).

10. On 30 May 2012, the Respondent's Acting Senior Assistant Registrar (Human Resource) invited the Petitioner to appear before the Respondent's Council Disciplinary Committee on 12 June 2012 at the C.M.R.T. Seminar room to answer to some 2 charges (insubordination and sexual inappropriateness and academic intimidation of students).
11. A meeting of the Human Resources Management Committee was held on 12 June 2012 and among the disciplinary cases discussed related to the Petitioner. The Petitioner was in attendance according to the minutes.
12. The minutes indicate that the Petitioner had been served with a show cause letter on 22 November 2011 and he had responded on 7 January 2012 seeking further particulars because according to him, the charges were vague and not specific.
13. The minutes further indicate that because the Petitioner objected to the charges as being vague and the Committee consequently resolved that the charges be redrafted and the Petitioner be charged afresh.
14. On 31 July 2012, the Respondent's Registrar issued to the Petitioner a show cause letter which charged him with insubordination and particulars of 4 incidents were outlined. The Petitioner was requested to respond in writing before 10 August 2012, and he responded through a letter dated 8 August 2012.
15. The next day, 9 August 2012, the Petitioner commenced legal proceedings against some 8 named members of the Respondent's staff in *Nakuru High Court Civil Case No. 304 A of 2012*.
16. Although it appears from the ruling delivered by R.P.V. Wendoh J on 28 February 2014 that the substratum of the cause of action was defamation, the Petitioner had also sought orders staying disciplinary action against him as conveyed to him by the Respondent's letter dated 1 August 2013 and which proceedings were to take place on 13 August 2013. The application for stay was dismissed because the Respondent was not a party thereto.
17. On 9 September 2013, the Petitioner commenced *Nakuru Judicial Review Misc. Civil Application No. 36 of 2013* seeking leave to bring an application for an order of certiorari to quash the decision of the Respondent contained in a letter dated 26 August 2013 purportedly suspending him from employment.
18. Leave was granted on 14 March 2014, and the Petitioner commenced the judicial review application under *Nakuru Judicial Review Misc. Civil Application No. 9 of 2014*.
19. In a ruling delivered on 11 June 2015, Mulwa J declined to grant the orders sought by the Petitioner (the ruling indicates the orders sought were against an invitation letter dated 6 March 2014 inviting the Petitioner to appear before the Respondent's Council Disciplinary Committee on 20 March 2014- and the charges appear to have been neglect of duty and sexual inappropriateness).
20. Dissatisfied with the ruling by Mulwa J, the Petitioner lodged an appeal to the Court of Appeal. The Petitioner also sought stay before the Court of Appeal through an application dated 25 June 2015.
21. The Petitioner had also apparently commenced defamation proceedings against the Respondent and some of its senior staff around March 2015 being *Nakuru High Court Civil Case No. 14 of 2015*.
22. Because the orders sought by the Petitioner in *Nakuru Judicial Review Application No. 9 of 2014* had failed, the Respondent, on 18 June 2015 invited the Petitioner to appear before its Council Disciplinary Committee on 3 July 2015 to answer to charges of *insubordination, neglect of duty and sexual inappropriateness*. Particulars were set out in the invitation letter.
23. It is these charges outlined through the letter dated 18 June 2015 which prompted the present Petition.
24. It is also germane to set out the prayers sought by the Petitioner. The prayers are 9 and are to the effect that

1). The Respondent do provide to the Petitioner the following:

(a) procedures and rules that govern the meeting

b) composition of the committee

c) be informed of the expected outcomes

d) the list of complainants and their witness statements e) list of any other witnesses that may be called to testify in this meeting

f) documentary evidence, if any that may be relied upon at this meeting

g) Minutes of the faculty of Health sciences board meeting that deliberated on these issues and consequently referred the matter to the University Council Disciplinary Committee since the faculty management committee is a creature of the Faculty board

2. Costs of the Petition

3. Any other orders, writs and directions the Honourable Court considers appropriate and just to grant for the purpose of the Petitioners constitutional rights.

25. In my view, in determining the present Petition, the Court must not lose sight of the intended outcome as reflected in the prayers sought by the Petitioner.

26. On 27 July 2015, the Court directed the Respondent to furnish the Petitioner with the documents he had sought to enable him prepare to meet the case facing him before the Disciplinary Committee.

27. On 21 October 2015, Mrs. Kairu for the Respondent informed the Court that the Respondent had supplied the requested documents to the Petitioner. The Petitioner however denied having been furnished with the documents.

28. With the background the Court now delve into the issues raised by the Petitioner.

29. The Petitioner has generally raised 2 issues in his submissions and these are violations of his *right to fair administrative action* (Article 47 of the Constitution) and the *right to fair hearing* (Article 50 of the Constitution).

30. The Petitioner admitted in his submissions that the Respondent furnished him with the documents he required on 19 October 2015 after the Court made an order to that effect.

31. That fact in the view of the Court should be enough to dispose of the Petition but the Court wishes to examine the extent, scope and nature of the right to fair labour practices within the ambit of procedural fairness and under what circumstances the Court ought to intervene before the conclusion of a disciplinary process.

32. In the course of proceedings, the Petitioner had also indicated that he was relying on the protection assured to employees by Article 41 of the Constitution (right to fair labour practices).

Right to fair labour practices/hearing

33. Article 41 of the Constitution has not given any contours to what a fair labour practice encompasses. Consequently, the Courts have the latitude to amplify on a case by case basis what the content of the right to fair labour practices comprise.

34. The starting point in that endeavour should be the statutory provisions which have been put in place by the legislature to give content to the right.

35. The primary source of the attempt to give meaning to the right to fair labour practices in as far as procedural fairness is concerned where termination of employment is under consideration is section 41 of the Employment Act, 2007.

36. The Section provide that as follows

41. (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

37. The above section provides the irreducible minimum protection to employees facing termination of employment and it has antecedents in the common law principles of natural justice or *audi alteram partem*.
38. This statutory provision has not expressly, provided that the employer ought to provide an employee with all documents, evidence or material it has in its possession before or during the disciplinary process.
39. It is in this regard that this Court has on several occasions held that an employer is not required by the prevailing statutory framework to conduct a mini-court in the name of a disciplinary process (see *Patrick Abuya v Institute of Certified Public Accountants of Kenya (ICPAK) & Ar* (2015) eKLR; *John Joel Muchura & Ors v Kenya Revenue Authority* (2015) eKLR; *Wilson Khasakhala v Menengai Oil Refineries Ltd* (2015) eKLR; *Antony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* (2013) eKLR and *Johnson Jadhan Othieno Okumu v. Pwani Oil Products Ltd* (2013) eKLR just to mention a few).
40. The Court of Appeal in the case of *Judicial Service Commission v Gladys Boss Shollei & Ar* (2014) eKLR also dealt with the place of the right to fair hearing within the employment relationship.
41. Okwengu JA was of the view that though the disciplinary proceedings were of a quasi-judicial nature, it was not a trial per se and therefore the employer's decision to decline an invitation to call oral evidence could not be faulted (see para 89), but the principles enunciated in the *Shollei case* must be understood within the context that arena was governed by a specific piece of statute and not the law of general application (the Employment Act, 2007).
42. In my view, the basic essentials of the protections afforded an employee by Article 41 of the Constitution and section 41 of the Employment Act, 2007, are that the employee should be informed in sufficient detail of the allegations, should be afforded an opportunity to make representations and ought to be accompanied during the process.
43. However, where the parties have by contractual agreement set out higher protections, an employer would be expected to scrupulously observe the protections envisaged under the contractual agreement.

When can Court intervene in disciplinary process?

44. That the Court can intervene in a disciplinary process is now universally accepted as gleaned from emerging jurisprudence, and the question remaining is, when can the Court intervene and not whether the Court can intervene.
45. And the principles flowing from the jurisprudence which is now common in the Employment and Labour Relations Court is that Courts should interfere in the disciplinary process only in very exceptional circumstances (see *Rebecca Ann Maina & 2 Ors v Jomo Kenyatta University of Agriculture & Technology* (2014) eKLR; *Joseph Mutura Mberia & Ar v Council of Jomo Kenyatta University of Agriculture & Technology* (2013) eKLR; *Aviation & Allied Workers Union v Kenya Airways Ltd* (2012) eKLR and my own decision in *Kenya Plantation & Agricultural Workers Union v Finlays Horticulture Kenya Ltd* (2015) eKLR where I reviewed the case law on the question).
46. The principle that Courts ought to intervene in the disciplinary process in very exceptional circumstances has statutory support on the legal reality that an employee whose employment has been unfairly terminated has very robust remedies including reinstatement and re-engagement.

Conclusion

47. In my view, the Petitioner here has been informed with sufficient clarity of the allegations to confront, been provided with relevant material, and he should stoically appear before the

Disciplinary Committee as invited and should the Respondent fail to meet the requirements or comply with the statutory and/or contractual protections, the Court would intervene accordingly if moved.

48. Considering the above, it is not necessary in the view of the Court to address the Article 47 right and its applicability in employment contracts. It is a complex legal question which requires in depth address by parties in a suitable prosecuted case and this case was not one such.

49. It is regrettable that a disciplinary process should be kept pending for over 4 years because of Court litigation, considering the personal nature of the employment relationship.

50. The Court in the event dismisses the Petition with an order that each party bears own costs.

Delivered, dated and signed in Nakuru on this 23rd day of March 2016.

Radido Stephen

Judge

Appearances

For Petitioner in person

For Respondent Mr. Kisila instructed by Sheth & Wathigo Advocates

Court Assistant Nixon