



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT MOMBASA
PETITION NUMBER 4 OF 2015
IN THE MATTER OF: CONTRAVENTION OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF: ALLEGED BREACH / AND OR INFRINGEMENT OF FUNDAMENTAL
RIGHTS AND FREEDOMS
AND
IN THE MATTER OF: ARTICLES 2, 3,10,19,20,21,22,23,27,28,35,41,47,48,50
159,165,258 & 259 OF THE CONSTITUTION OF KENYA 2010;
BETWEEN
DR. TITUS TUNJE KADERE PETITIONER
AND
TECHNICAL UNIVERSITY OF MOMBASA RESPONDENT

JUDGMENT

Petition

1. The Petitioner was employed by the Respondent University as its Academic Registrar, through a letter of employment dated 4th June 2010. He was offered a 5 year term contract. At the time, the Respondent was a Constituent College of the Jomo Kenyatta University of Agriculture and Technology. The Respondent was later granted its Charter. It converted the Petitioner's terms and conditions to permanent and pensionable.

2. His duties included Students' selection; their admission and registration; and provision of secretariat services to the University Senate and to Senate Committees. He was appointed on 17th November 2014, to investigate the suitability of 61 Students admitted to study at the Respondent for a Bachelor of Science in Electrical and Electronic Engineering.

3. Before the Petitioner could complete the task of investigating the 61 Students, he was suspended by the Respondent through its Vice-Chancellor, in a letter dated 15th December 2014. He was charged with the offence of irregular admission of Students. The Respondent alleged also, that the Petitioner was liable for irregular grant of scholarship to unqualified Person. He was subsequently heard by an Ad Hoc Committee, the Staff Disciplinary Committee and eventually by an Appellate Committee.

4. The Staff Disciplinary Committee heard the Petitioner on the 29th and 30th April 2015. It communicated its decision to the Petitioner in a letter dated 4th May 2015. He was found guilty on the charges of irregular admission of Students, and irregular grant of scholarship. His conduct amounted to abuse of office, and in contravention of the Petitioner's terms of service for Registrar Academic Affairs Clause 23.1; Section 44[4] [c] of the Employment Act 2007; and the Respondent's Code of Conduct and Ethics. It was decided by the Committee that the Petitioner is warned and deployed to Pure and Applied Sciences Faculty as a Senior Lecturer. He was to retain the rate of basic salary and house allowance applicable to him as Registrar. He was to be paid his salary and allowances which were withheld during the period of suspension.

5. The Petitioner did not agree with the Respondent's decision and filed this Petition. The Petition was initially received at the High Court in Mombasa. It was transferred by an Order of the High Court on jurisdictional ground, on the 6th July 2015. The Petitioner alleges his fundamental rights enshrined in the Articles specified in the title to this Petition, have been contravened by the Respondent. He seeks the following Orders:

a) A declaration that the Respondent's acts and/ or omissions in respect of subjecting the Petitioner to inequality, discrimination/bias, loss of human dignity, unfair labour practices, unfair administrative action, and unfair trial/ hearing was/is unconstitutional, null and void;

b) A Permanent injunction to issue restraining the Respondent, its servants, agents, employees, or otherwise whatsoever from continued advertising, interviewing, recruiting and/ or in any manner whatsoever offering up or filling the position of Registrar Academic Affairs Technical University of Mombasa, to/ with any other individual other than the Petitioner.

c) A mandatory injunction, compelling the Respondent, its servants, agents, employees or otherwise whosoever to reinstate the Petitioner to the position of Registrar Academic Affairs, Technical University of Mombasa, with full basic salary house allowance and other benefits on salary scale 15A, on permanent and pensionable terms pertaining as at 17th November 2014.

d) Costs of the Petition are provided for.

e) Any other relief the Honourable Court may deem appropriate fair and just in the circumstances.

6. The Petitioner sought and was granted an interim Order, restraining the Respondent from advertising or recruiting for the position of Academic Registrar. Also granted in the interim, was an Order restraining the Respondent from interfering with the Petitioner's occupancy of the Respondent's staff house. These orders issued on the 7th July 2015.

7. On 21st July 2015, Parties agreed to have the above orders maintained; the Respondent to file Response to the Substantive Petition; and the intended Preliminary Objection by the Respondent joined to the Petition. It was further agreed Parties would file Submissions and make brief oral Submissions on the 10th February 2016, underlining their respective positions on the dispute.

Response

8. The Respondent filed a Replying Affidavit sworn by its Vice- Chancellor Professor Josphat Z.K. Mwatelah on the 7th August 2015. It is conceded the Petitioner was employed by the Respondent, as stated in his Petition. His employment was converted to permanent and pensionable terms, upon the

Respondent acquiring its Charter.

9. He was suspended on 15th December 2014, to allow the Respondent investigate allegations of irregular admission of Students made against the Respondent. He was invited to show cause why disciplinary action should not be instituted against him. He was given a chance to appear before an Ad Hoc Committee which investigated the allegations. He was interdicted on 9th March 2015, charges drawn against him, before he was heard by the Staff Disciplinary Committee. He asked for documents relating to the hearing, and the Respondent supplied these to the Petitioner on the 26th March 2015. He was given specific charges before the Staff Disciplinary Committee: he irregularly admitted Students; and irregularly awarded his daughter Mbuhe Tunje a scholarship to pursue Masters Degree out of the Country. The Petitioner defended himself and called 4 Witnesses. He was found guilty. He was issued a warning and deployed to the department of Pure and Applied Sciences as a Senior Lecturer. He was to retain his basic salary and house allowance. Other terms would be as per Academic Staff Grade 13 A. He was paid all his dues which were withheld during suspension.

10. He appealed to the University Council against the decision of the Staff Disciplinary Committee. His Appeal was confined to part of the verdict. He stated he was only appealing against the warning and redeployment. He did not challenge the finding of guilty, but was only concerned with the sentence. The Appeal was heard and rejected. The disciplinary process followed Clause 23 of the Petitioner's contract of employment. The Respondent adhered to the Terms and Conditions of Service and the Employment Act. The Petition discloses no particulars of violation of the Petitioner's fundamental rights. Rules of Natural Justice were observed. The Petition does not exhibit any constitutional moment.

11. The Respondent states in its Preliminary Objection that there are adequate remedial measures in the statute law. The jurisdiction of the Constitutional Court cannot be invoked until statutory mechanisms have been exhausted. Specifically, the Employment Act 2007 and the Employment and Labour Relations Court Act, create remedies which are available to the Petitioner, without resort to the Constitution. The Petition should be anchored on these laws, and on the Respondent's Terms and Conditions of Service for Academic Registrar [Clause 23.]; and the Respondent's Code of Conduct and Ethics. Parties are bound by the contract of employment.

Parties' Submissions

12. The Petitioner submits the Respondent violated the Petitioner's constitutional rights with regard to nondiscrimination, loss of human dignity, fair labour practices and fair trial. The Respondent acted as the Investigator, Prosecutor and Jury. Section 35 [1] of the University Act 2012 which entrusts academic affairs to the Senate and day to day management to the Management Board, was disregarded.

13. The Respondent did not raise credible defence to the issues raised by the Petitioner. Following the South African Case of ***Council of Mining Unions v. Chamber of Mines of South Africa [1985] 6 ILJ 293 [IC]*** the Petitioner urges the Court to find fairness, means something more than lawful. Even though conduct is lawful, it is not necessarily fair. Interpretation of fair labour practices should follow this standard of fairness. This reasoning on the standard of fair dealing between Employers and Employees was upheld in the Industrial Court of Kenya at Nairobi Cause between ***Elizabeth Washeke & 62 Ors v Airtel Networks [K] Limited [2013] e-KLR***. The principle of fair hearing entails sufficient time to prepare for the disciplinary hearing; the right to fully understand the charges; and the right to documentation, as held in ***Industrial Court Cause at Nairobi between David Wanjau Muhoro v. Ol Pejeta Ranching Limited [2014] e-KLR***. The Petitioner cites a series of other Decisions of the Industrial Court, where particular Employees were reinstated with back pay. It is further submitted that Section 41 of the Employment Act is a mandatory procedure. The Petitioner submits he has shown the Court that his fundamental rights were violated, and he is entitled to the prayers outlined in the Petition.

14. The Respondent submits the Petitioner failed to disclose to the Court certain Clauses in his contract of employment, which were detrimental to his Petition. Clause 23.1 gave the Respondent the power to take disciplinary action against the Petitioner, in accordance with the Employment Act. The Petitioner was tried for certain employment offences in accordance with his Terms and Conditions of Service and

the Employment Act, and found guilty. He was granted hearing by the Ad Hoc Committee; the Staff Disciplinary Committee; and the Appellate Organ. Adopting the Industrial Court at Mombasa decision in ***Thomas Sila Nzivo v Bamburi Cement Limited [2015] e-KLR***, the Respondent argues that the Petitioner should not confuse his disciplinary hearing for a criminal trial where the standard of proof is beyond reasonable doubt. The Petitioner's averments about violation of his constitutional rights are imprecise, wild, speculative and general. The Employment Act and the Employment and Labour Relations Court Act, address the issues such as are raised in the Petitioner's disguised Petition. Section 12 of the latter Act empowers the Court to grant interim preservation orders; declaratory orders; and orders of reinstatement of Employees. The Constitution cannot be a general substitute for normal procedures for invoking judicial control of administrative action.

15. In ***Nairobi High Court Petition between Boniface Mwangi v. Resident Magistrate Court at Milimani & 2 Ors. [2015] e-KLR***, the Court ruled that not every contravention falling under statute is redressed through the Constitution. The statutes would be rendered useless if every contravention is turned into a constitutional grievance. Where a matter can be disposed of without recourse to the Constitution, the Constitution should not be involved at all [***John Harun Mwau v. Peter Gatrow & 3 Ors [2014] e-KLR***]. Where a Party deliberately avoids to pursue statutory remedies, but instead invokes the Constitution, such a move constitutes abuse of the Court Process [***'Demystifying the Constitutional Court in Kenya'*** by ***Petronella Mukaindo, citing the High Court Petition Number 613 of 2006, at Nairobi, between Rodgers Mema Nzioka v. The Attorney General***] The totality of the Respondent's submission is this: the Respondent has a right to initiate disciplinary proceedings against its Employee; a Constitutional Petition is not the most suitable and convenient remedy available to the Petitioner; the Petitioner has not demonstrated to the requisite standards, a violation of any constitutional right; and failure to move the Court under the Employment Act and the Employment and Labour Relations Court Act, renders the entire Petition an abuse of the Court Process.

Issues

16. The Petition raises the following questions:-

- a) Is there a Constitutional Moment shown by the Petitioner?
- b) If not, and the Court treats the dispute as an ordinary Employer-Employee dispute under the relevant Statutes, did the Respondent meet the demands of the relevant Statutes in disciplining the Petitioner? Did the Respondent have valid ground in taking the disciplinary measures, and was the decision fairly arrived at?
- c) Lastly, is the Petitioner entitled to the remedies sought either under the Constitution, or under Statute?

The Court Finds:-

17. Constitutional Moment

This first question was raised preliminarily. The Court directed it be joined with the rest of the dispute, and determination be made with the final decision. The first question is therefore at the core of the dispute, and should be answered before all else.

18. The first port of entry in the legal relationship between the Petitioner and the Respondent is the contract of employment dated 4th June 2010. This contract was subsequently varied through the Conversion of Terms letter, dated 2nd December 2013. This happened after the Respondent obtained its Charter. The Petitioner became permanent and pensionable. In case of a dispute arising between the Parties, the contract of employment would be the first place to look at in attempting to resolve the dispute. It is the first port of entry.

19. Other instruments, including the Human Resources Manuals, the Statutes, and the Constitution are

secondary ports.

20. The Claimant's contract adopted Terms of Service for Registrar Academic Affairs. Clause 23 deals with discipline providing *inter alia*: where the Registrar Academic Affairs goes against the University Statutes, Regulations and Policies, the Council shall have powers to take disciplinary action as per the Employment Act; disciplinary action shall include warning, suspension, termination, or dismissal; all disciplinary actions administered shall be subject to right of appeal to the Council of the University; such Appeal shall be heard by a Committee appointed by the Council not later than 90 days from the date of the disciplinary action; the Registrar Academic Affairs shall have the right of appearing at the hearing for his defence; and where no settlement is arrived at the Appeal, either of the Parties shall refer the matter to the Industrial Court for further action.

21. The Terms of Service are co-opted as part of the contract entered into by the Parties, with effect from 1st July 2010, and subsequently amended through the Conversion of Terms letter. The last paragraph to the letter of employment states other terms and conditions of employment were to be read in the University Statutes. The Terms of Service expressly state the applicable law is the Employment Act. In the view of the Court, the Contract, the Terms of Service and the Employment Act are paramount in determining any dispute between the Parties. The Constitution of Kenya would only come in, as held in the Judicial Authorities cited hereunder.

22. In ***Petition Number 564 of 2004 at High Court Nairobi, Alphonse Mwangemi & 11 Others v. Africa Safari Club; Industrial Court at Nairobi, East African Portland Cement Limited v. The Attorney-General & Another [2013] e-KLR; High Court Nairobi, Uhuru Muigai Kenyatta v. Nairobi Publication Limited [2013] e-KLR; Nairobi High Court, Alex Malikhe Wafubwa v. Elias Nambakha Wamita & 4 Others [2012] e-KLR; Nairobi High Court, Boniface Mwangi v. Resident Magistrate's Court Milimani & 2 Others; and Industrial Court at Nairobi, George S. Onyango OGW v. Board of Directors Numerical Machining Complex Limited & 2 Others***, the Courts held the Constitution should not be used for everyday litigation. This strand of thought runs through all these decisions. To characterize every dispute as a constitutional dispute, transforms the Constitution from a blueprint of fundamental rights and freedoms, to a document for litigating daily disputes. The Constitution loses its moral force through such misuse.

23. In ***GMV v. Bank of Africa Limited [2013] e-KLR*** the Industrial Court, sitting at Nairobi, held that if an Employer adopts a labour practice thought to be unfair, the aggrieved Employee should primarily seek remedy under the legislation which governs his contract of employment. If the Employee finds no remedy under the relevant legislation, the relevant legislation might come under scrutiny for not giving adequate protection to a constitutional right.

24. Courts have also recognized that every contractual or common-law dispute is potentially a constitutional matter. The grievances raised by the Petitioner can be stretched through argument, to assume the face of constitutional grievances. Constitutional Courts encourage these expansive arguments, by accepting jurisdiction on most disputes where constitutional violation is invoked. The rule is that the Constitutional Court must be always slow in declining jurisdiction.

25. In the ***South African decision of Carmichele v. Minister of Safety and Security [2001] [4] SA 938, 2001 [10] BCLR***, the Court gave guidance on demarcating constitutional grievances and contractual or common-law grievances. Where the Court determines rights asserted by a Party do not relate directly to the Bill of Rights, it may still apply the Bill of Rights to the dispute. It must always infuse any law with the general spirit, purport and objects of the Bill of Rights. The Court is not confined by the Pleadings filed by the Parties; it must be prepared to raise of its own accord constitutional issues that may affect a legal relationship, interpretation of legislation or the development of the common-law. Simply because an interpretation of a statute, or common law rule, would in the abstract raise some kind of constitutional issue does not mean Parties adopt constitutional argument in every dispute. The Court likewise need not provide a constitutional analysis of the status of common-law or piece of legislation in every case which such rule is dispositive.

26. The Petitioner herein, Dr. Titus Tunje Kadere, has not persuaded the Court that his grievances are constitutional violations, which cannot be addressed at the first port of entry. He has not shown that the facts in this dispute demand the Court applies the Bill of Rights to the perceived grievances.

27. His Petition may be contrasted with that filed by ***George Onyango against the Board of Directors Numerical Machining Complex Limited*** cited above. George Onyango was the CEO of the Numerical Company, a State Corporation. He disputed the non-renewal by the State of his contract of employment. He implicated the President and the relevant Minister of putting in place a Board of Directors, contrary to the statute creating the Numerical Company, and in contravention of the Constitution. He was aggrieved by what he deemed as breach of his terms and conditions of service. Beyond this, he established a clear case of abuse of power by the Executive, in appointing the Board of Directors, which Board determined his old contract was at end, and there was going to be no renewal. The ***George Onyango*** case raised issues of misuse of state power, affecting the legislation constituting the Numerical Machining, and fundamentally affecting the individual contract of employment. There were factors closely interconnecting the contract of employment, statutes and the organic law. This cannot be said to be the case with the current Petition.

28. The Court is satisfied the Petitioner has not shown any constitutional moment to warrant the filing of a Constitutional Petition. Remedies under Article 23 [3] of the Constitution would therefore not be accessible to the Petitioner.

29. **Breach under Statutes**

His contract as seen above embraces the Terms of Service for the Academic Registrar, the University Statutes [to which the Code of Conduct belongs] and the Employment Act. The dispute should therefore be treated as an ordinary Employer- Employee dispute arising out of a contract of employment, to which the Employment Act 2007 and the Employment and Labour Relations Court Act [previously the Industrial Court Act] apply.

30. Section 41, 43 and 45 of the Employment Act require that before disciplinary sanction issues against an Employee, the sanction must be preceded by procedural fairness and substantive justification. If there is default in the procedure, and failure in substantive justification, the Court considers remedies under Section 49 of the Employment Act and Section 12 of the Employment and Labour Relations Court Act.

31. The filing of this dispute as a Petition invariably limits the Parties to affidavit evidence, and the Court does not have the benefit of hearing the Parties in person, to gauge their credibility and veracity of their evidence. When Parties opt to go by affidavit evidence, they deny themselves and the Court, the power of the spoken word.

32. From the affidavits and exhibits filed by the Parties, the Respondent asserts the following to constitute a fair procedure: the Petitioner was faced with the allegations of admission of 61 Students irregularly and of awarding his daughter scholarship to study for her Masters' Degree outside Kenya; the Petitioner was invited to show cause why disciplinary action should not issue against him; he made his response; he was suspended; he was invited and appeared before the Ad Hoc Committee which investigated the allegations; he was charged with the specific offences and granted a hearing before the Staff Disciplinary Committee; he was heard, and presented 4 Witnesses; he asked for documentation at the Staff Disciplinary hearing level and the documents were supplied; a decision was made that he is served with a warning, reassigned the role of a Senior Lecturer in Applied Sciences and Pure Sciences Department, and his salary and allowances for the suspension period paid; and lastly the Petitioner appealed to the University Council, he was heard, and the decision of the Staff Disciplinary Committee was sustained.

33. The Court does not see anything in this procedure to suggest the Petitioner was treated unfairly. He cites the decision of ***David Wanjau Muhoro v. Ol Pejeta Ranching Limited [2014] e-KLR***, and other decisions of the Industrial Court, without showing how these decisions support his case for procedural fairness. There is no evidence or material availed to the Court by the Petitioner which would lead the Court to conclude that the Petitioner was denied sufficient time to prepare for the disciplinary hearing; he

did not show he was not granted sufficient time to study and understand the charges; and when he asked for documents, they were made available. The decisions supplied to the Court by the Petitioner tend to show compliance with, rather than departure from, the demands of procedural justice by the Respondent

34. On 7th May 2015, the Petitioner wrote to the University Council, in furtherance of his Appeal. He writes he had launched his Appeal against part of the verdict. Specifically, he stated his Appeal was on the sentence. He uses the term verdict loosely to denote the finding of guilt and the sentence, but clarifies that he specifically wishes to challenge the sentence. He does not in his letter of 7th May 2015, challenge the findings of guilt on the charges laid out against him. The Respondent cannot be called upon to make out an additional case for procedural justice and substantive justification, while the Petitioner expressly states he has only a problem with the sentencing. The sentence, as seen above, was that the Petitioner would move to the Department of Pure and Applied Sciences as a Senior Lecturer. He would continue to earn the same basic salary and house allowance. The salary and allowance withheld during suspension would be released to him. He was warned.

35. This was a slap on the wrist for an Employee charged with, and found guilty of, irregular admission of students, and granting his own daughter a scholarship. The Court does not interfere with the discretion of Employers in sentencing of Employees found guilty of employment offences, unless it can be shown such exercise of discretion is unreasonable. The Respondent acted quite fairly and sensibly. The Petitioner lost nothing shown to the Court. Respondent complains to have made monetary loss through the Petitioner's grant of scholarship to his kin. He was merely warned and given a lateral transfer. Sentencing, seen against the gravity of the proven offences, was fair, reasonable and in accordance with the Terms and Service.

36. The disciplinary procedure and sanction were in accordance with the Contract of Employment; the Terms of Service; the Code of Conduct; and the Employment Act.

Remedies

37. The declaratory remedy sought by the Petitioner has no justification and is declined.

38. A permanent injunction restraining the Respondent from employing any other person, other than the Petitioner to the position of Registrar Academic Affairs, has no merit. There is no factual or legal basis shown for grant of a permanent injunction. Even had the Petitioner demonstrated he merits his old job back, it cannot be that the Respondent is prevented permanently from employing other qualified individuals as Registrar Academic Affairs, in the future. Jobs are not permanently reserved for any one individual at any employment place, and the employment relationship at some point, comes to an end. A permanent injunction would restrict the Respondent's managerial prerogative, as well as limit the Parties' contractual liberty to terminate the contract of employment on notice.

39. A mandatory injunction compelling the Respondent to reinstate the Petitioner as the Registrar Academic Affairs, as argued above, would amount to interference by the Court, with the discretion of the Respondent to sentence an Employee who was found guilty of grave employment offences. Furthermore, the Court must not unduly interfere with the Employer's prerogative in transfer of Employees, particularly where such transfer is not shown to be actuated by malice, and to result in profound prejudice to the Employee. This prerogative should be protected by the Courts, even when it is not exercised as a disciplinary sanction. It is the Employer who knows best, where an Employee fits, within the enterprise.

40. In summary the Court finds this dispute is not suitable matter to be characterized as a Constitutional Petition. The preliminary objection has merit, but should not result in immediate dismissal of the Petition. The Petition must be looked at as a regular employment dispute between an Employer and an Employee based on the contract of employment, and statutes governing that contract. Upon doing this the Court is satisfied the disciplinary procedure and sanction against the Petitioner conformed to the standards set under the contract of employment and statutes. The standards of fairness and substantive justification were achieved. The remedies sought are unavailable under the Constitution, the Contract and the relevant Statutes.

IT IS ORDERED:

- a) The Petition is rejected.***
- b) The Respondent is free to fill the position of Registrar, Academic Affairs.***
- c) Costs to the Respondent.***

Dated and delivered at Mombasa this 24th day of June 2016

James Rika

Judge