



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO 93 OF 2015

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLES 1, 2, 3,27,28,41,43,47,50,165 AND 259 OF THE

CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE HARASSMENT, PREJUDICE, VICTIMIZATION AND

DISCRIMINATION OF THE PETITIONER

AND

IN THE MATTER OF THE VIOLATION OF THE CONSTITUTIONAL RIGHTS OF THE

PETITIONER

AND

IN THE MATTER OF THE ILLEGAL, UNREASONABLE AND UNCONSTITUTIONAL

ACTIONS OF THE RESPONDENTS

AND

IN THE MATTER OF THE VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS

BETWEEN

VALERIE RUGENE.....PETITIONER

VERSUS

PUBLIC SERVICE COMMISSION.....1ST RESPONDENT

THE PRINCIPAL SECRETARY MINISTRY OF FOREIGN AFFAIRS.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, Valerie Rugene is an employee in the Kenya Public Service. She has brought this Petition alleging violation of her constitutional rights.
2. The 1st Respondent is a Constitutional Commission established under Article 233 of the Constitution. The 2nd Respondent is the Principal Secretary in the Ministry of Foreign Affairs and International Trade. The 3rd Respondent is the Attorney General of the Republic of Kenya and is sued on behalf of the Government.

The Petition

3. On 29th July 2013, following a competitive process, the 1st Respondent appointed the Petitioner as Foreign Service Officer I in the Ministry of Foreign Affairs and International Trade.
4. On 3rd June 2014, the Petitioner was deployed to the Ministry of Interior and Coordination of National Government, Office of the President as a Government Reception Officer. She states that no reasons or explanation was given for this deployment.
5. On 23rd July 2014, the Petitioner was yet again transferred to the Ministry of Information, Communication and Technology as Chief Public Communications Officer. She states that she was not given any explanation for the transfer and that she does not possess the training and expertise for this position.
6. The Petitioner contends that the source of her problems is the fact that she is married to a senior official in the Ministry of Foreign Affairs and International Trade.
7. The Petitioner wrote to the 1st Respondent complaining about the transfers which she construed as harassment and an infringement of her constitutional rights.
8. Instead of acting on her complaints, the 1st Respondent ordered her to show cause why disciplinary action should not be taken against her for writing an inappropriate and disrespectful letter.
9. The 1st Respondent thereafter declared the Petitioner unfit to serve in the Foreign Service, ordered that she be severely reprimanded, be re-designated to Public Communications Officer and be transferred to the Ministry of Information, Communications and Technology.
10. It is the Petitioner's case that the 1st Respondent became the complainant, accuser, prosecutor, judge and executioner in the same cause. She avers that the conduct of the Respondents was a negation of the concept of due process, fairness and justice as enshrined in Articles 47 and 50 as well as Chapter 10 of the Constitution.
11. The Petitioner further states that the conduct of the Respondents was in flagrant abuse of their offices contrary to Chapter 6 of the Constitution. The Respondents had acted in an arbitrary, high handed, prejudicial and oppressive manner without regard to the constitutionally protected dignity, social, labour and economic rights of the Petitioner. They had contravened all principles of natural justice and the rule of law.
12. The Petitioner sets out the following instances of violation of her constitutional rights by the Respondents:

- a) That in failing to address the Petitioner's complaints, the Respondents denied her the rights to fair administrative action and fair hearing as enshrined in Articles 47 and 50 of the Constitution;
- b) That in turning themselves into accuser, prosecutor, judge and executioner, the Respondents violated all principles of natural justice under Articles 47 and 50 of the Constitution;
- c) That the Respondents breached the requirements of integrity as laid down under Chapter 6 of the Constitution;
- d) That the Respondents subjected the Petitioner to unfair labour practices contrary to Article 41 of the Constitution. Her rights to privacy and human dignity under Articles 28 and 31 were also violated.

13. The Petitioner prays for:

- a) A declaration that the punishment meted against her by the Respondents being a severe reprimand, a finding that she is unfit to serve in the Foreign Service and re-designation to Public Communications Officer as contained in the Respondents' letters dated 15th July 2015, 19th August 2015, 21st August 2015 and 26th October 2015 is unconstitutional and therefore null and void *ab initio*;
- b) An order that the Petitioner shall continue to serve as Foreign Service Officer I;
- c) That the said letters dated 15th July 2015, 19th August 2015, 21st August 2015 and 26th October 2015 be by a judicial review order of certiorari brought into this Court and quashed forthwith;
- d) General damages;
- e) Costs of the Petition.

The Respondents' Reply

14. The Respondents' Reply is contained in a replying affidavit sworn by the Secretary/Chief Executive Officer of the 1st Respondent, Alice A. Otwala on 30th November 2015.

15. Otwala depones that vide letter dated 18th August 2014, the Petitioner sought intervention of the 1st Respondent over what she termed as unfair treatment, harassment, discrimination and gross breach of her privacy by the Principal Secretary in the Ministry of Foreign Affairs and International Trade.

16. The 1st Respondent immediately carried out a preliminary investigation on the allegations and found that the Petitioner's allegations were false and unfounded.

17. It was further discovered that the Petitioner had in fact failed to provide adequate information pertaining to her previous employment and was dishonest and disrespectful in making such a complaint against her boss based on hearsay and outright lies.

18. The 1st Respondent therefore recommended that disciplinary proceedings be commenced against the Petitioner. The Petitioner was issued with a letter requiring her to show cause why action should not be taken against her for gross misconduct in spreading lies and general dishonesty about her deployment.

19. The Petitioner was given an opportunity to personally appear before the 1st Respondent to highlight her response to the show cause letter. Her response and oral explanations were found to be mere denials to the issues raised.

20. Otwala goes on to depone that the Petitioner was clearly aware of the charges against her to which she

responded both in writing and orally and cannot purport to have been unaware that she was appearing to defend herself.

21. The upshot of the disciplinary proceedings was a recommendation that the Petitioner be strongly warned and that she be deployed to another Ministry.

22. The Petitioner's appeal dated 2nd November 2015 was yet to be determined. Otswala therefore depones that the Petitioner came to Court prematurely.

Findings and Determination

23. From the pleadings and submissions filed by the parties, I have distilled the following issues for determination in this Petition:

- a. Whether the Petitioner's reprimand, re-designation and transfer amounts to a violation of her constitutional rights;
- b. Whether in dealing with the Petitioner's case the 1st Respondent acted lawfully and fairly;
- c. Whether the Petitioner is entitled to the remedies sought.

The Petitioner's Reprimand, Re-designation and Transfer

24. The dispute now before the Court was triggered by the Petitioner's letter dated 18th August 2014 addressed to the Secretary/CEO of the Public Service Commission. In this letter which the Petitioner references as '*Unfair Treatment, Harassment, Discrimination & Gross Breach of (My) Privacy*', she states that unfounded questions had been raised regarding her appointment to the position of Foreign Service Officer I, in the Ministry of Foreign Affairs and International Trade. The Petitioner also takes issue with her deployment to the Ministry of Interior and her subsequent transfer to the Ministry of Information, Communication and Technology in the position of Chief Public Communications Officer.

25. The Petitioner attributes her perceived problems to her private relationship with a senior officer in the Ministry of Foreign Affairs and International Trade who identified himself in a sworn affidavit as Patrick Simiyu Wamoto, the Ambassador/High Commissioner of Kenya to the Republic of South Africa. I will address myself to the contents of this affidavit later in this judgment.

26. Upon receiving the Petitioner's compliant, the Public Service Commission invited her to clarify the issues raised in her letter of 18th August 2014. She was required to present herself on 6th February 2015 and was expected to avail several documents relating to her employment.

27. The record of the proceedings were not availed to the Court but on 25th February 2015, the Public Service Commission wrote to the Petitioner as follows:

"SHOW CAUSE LETTER-GROSS MISCONDUCT

Ref. Your Letter dated 18.8.2014

In your letter dated 18.8.2014 addressed to the Secretary/CEO Public Service Commission you made several allegations against the Principal Secretary among them being:

- (i) That he transferred you to another Ministry before you had gained experience;*
- (ii) Re-designating you to Chief Public Communications Officer without seeking your concurrence for such re-designation or posting; and*

(iii) That he had malicious reasons for making the transfer one being your private life which had nothing to do with official duty.

The Public Service Commission carried out preliminary investigations on the allegations you made and it transpired that they were untrue, disrespectful and based on hearsay. This breach of discipline amounts to gross misconduct.

Consequently it is contemplated to dismiss you from the Service for:

(i) Spreading lies and making dishonest, unfounded allegations about your posting by the Principal Secretary to the Ministry of Interior and Coordination of National Government;

(ii) Falsely alleging that you were subjected to unfair treatment, harassment, discrimination and breach of privacy thereby showing disrespect and casting aspersion on the character of the Principal Secretary;

(iii) Failing to disclose information on previous employment in the Civil Service for which you had been assigned a personal number; and

(iv) Ignoring the chain of command and falsely claiming that you had been re-designated to Chief Public Communications Officer.

However, before the contemplated dismissal is taken against (sic) you are required to show cause why the same should not be taken.

Your representations if any should be submitted to the Secretary, Public Service Commission within Twenty-One (21) days from the date of this letter failure to which, the intended action will be taken without any reference to you.

Alice A. Otwala (Mrs.), CBS

SECRETARY/CEO

PUBLIC SERVICE COMMISSION”

28. By her letter dated 12th March 2015, the Petitioner responded to the show cause letter stating that in her understanding the matter had been closed after she had received communication to return to her Ministry and that she had communicated this information verbally during a clarification session held at the Public Service Commission on 6th February 2015.

29. The Petitioner further makes blow by blow response to the accusations made against her in the show cause letter. She admits and regrets having broken the chain of command. She also regrets the tone of her complaint.

30. The decision on the Petitioner’s case was communicated to the Principal Secretary, Ministry of Foreign Affairs and International Trade by letter dated 15th July 2015 as follows:

“UNFAIR TREATMENT, HARRASSMENT, DISCRIMINATION AND GROSS BREACH OF HER PRIVACY-MS. VALERIE WANJIKU RUGENE, P/NO 2009132676, FOREIGN SERVICE OFFICER

This is to inform you that the Public Service Commission has considered the concerns raised by Ms. Valerie Wanjiku Rugene, P/NO. 2009132676, First Secretary Job Group ‘M’ in your Ministry and decided that she be:

(i) Severely reprimanded;

(ii) Re-designated to Public Communications Officer cadre as her conduct does not befit the Diplomatic Service; and

(iii) Transferred to the Ministry of Information, Communication and Technology.

Please take the necessary action accordingly.

Alice A. Otswala (Mrs.), CBS

SECRETARY/CEO

PUBLIC SERVICE COMMISSION

31. The decision of the Public Service Commission was communicated to the Petitioner in three (3) instalments:

(a) First, by letter of severe reprimand from the Principal Secretary, Ministry of Foreign Affairs and International Trade dated 19th August 2015;

(b) Second, by letter of release from the Principal Secretary, Ministry of Foreign Affairs and International Trade dated 21st August 2015;

(c) Third, by letter of re-designation from the Principal Secretary, Ministry of Foreign Affairs and International Trade dated 26th October 2015.

32. The question before the Court is whether the decision taken by the 1st Respondent as against the Petitioner was lawful and fair. In answering this question, the Court is called upon to examine the reason given for the decision as well as the procedure adopted in reaching that decision.

33. With regard to the reason for the decision, it would appear that the Petitioner's complaint against the Principal Secretary, Ministry of Foreign Affairs and International Trade triggered it all. No doubt, the complaint raised very serious issues. However, the concern of the Court is not with the severity of the issues raised but rather on whether there was substance in the complaint.

34. Article 234 of the Constitution sets out the powers and functions of the Public Service Commission. Among these functions is to exercise disciplinary control over persons holding public office and develop human resources in the public service.

35. The Commission is also charged with the responsibility of promoting the values and principles referred to in Articles 10 and 232. Among the values set out under Article 10 is equity, equality and non-discrimination.

36. The gist of the Petitioner's complaint was that she was not treated fairly. It seems to me therefore that it fell upon the 1st Respondent to establish the veracity of the Petitioner's complaint and advise her accordingly.

37. However, in a surprising turn of events, the 1st Respondent turned the Petitioner's complaint into a launching pad for a disciplinary process against her. Even worse, the 1st Respondent on its own motion and without involving the Petitioner, decided to conduct preliminary investigations on whose basis, it reached the conclusion that the Petitioner had in fact committed acts of gross misconduct.

38. The action by the 1st Respondent was rather surprising because the issues raised in the Petitioner's complaint involved her private relationship with a senior officer in the Ministry of Foreign Affairs and

International Trade. Yet, there was no evidence of either the Petitioner or the senior officer, Patrick Simiyu Wamoto being invited to shed light on the snowballing situation at the Ministry.

39. I have read the affidavit sworn by Wamoto whose contents have not been rebutted and find that there were apparent relational difficulties between Wamoto and the Principal Secretary, Ministry of Foreign Affairs and International Trade, which appear to have impacted the Petitioner's employment negatively.

40. This is where the 1st Respondent should have come in to play a neutral and pacifying role and more importantly, to protect the Petitioner from the personal fights between Wamoto and the Principal Secretary. It failed and instead assumed the role of accuser, prosecutor and judge against the Petitioner.

41. The disciplinary process initiated by the 1st Respondent culminated in the Petitioner losing her appointment as a Foreign Service Officer. To my mind, a career in the Foreign Service is specialized and those who choose to take that path make a deliberate choice. Indeed, the Petitioner pleads that she declined to renew her contract as a Senior Public Communications Officer in the then office of the Government Spokesperson. She chose instead to pursue a career in the Foreign Service and was competitively appointed to the position of Foreign Service Officer I.

42. This Court takes the view that the decision to take away the Petitioner's career in Foreign Service under the guise of re-designation had neither legal basis nor policy backing. As held by **Onyango J**, in **James Waithaka Chege & 12 Others v Cabinet Secretary, Ministry of Interior & Coordination of National Government [2015] eKLR** re-designation is a procedure which amounts to a new contract of employment to which both the employer and the employee must consent.

43. The Court was referred to Clause B. 28 of the 1st Respondent's Human Resource Policies and Procedures Manual which provides an elaborate procedure for re-designation of public officers. There was no evidence that this procedure was followed in the Petitioner's case perhaps because hers was a disciplinary re-designation which brings me to the question whether the Petitioner was afforded a fair hearing.

44. In the submissions filed on behalf of the Respondents, it was submitted that because there was exchange of correspondence, then the Petitioner was duly heard. In this regard, the Court was referred to the old case of **Selvarajan v Race Relations Board [1976] ALL ER 12** where it was held that an oral hearing is not a requirement. With respect to Counsel for the Respondents, I do not think this kind of jurisprudence can survive in our current constitutional dispensation.

45. This Court has stated elsewhere that an employee facing a disciplinary process ought to be clear that what they are going through is not just a consultation over a cup of tea but a disciplinary process with severe consequences (see **Nazareno Kariuki v Feed the Children Kenya[2013] eKLR**).

This is the essence of the procedure set out in Section 41 of the Employment Act, 2007.

46. I have examined the events leading to the disciplinary action taken against the Petitioner and find that due procedure was not followed. In her several letters to the 1st Respondent, the Petitioner consistently expressed her surprise regarding the turn of events. At some point, she even believed that the matter had been closed. I hold the view that given the severity of the action taken against her, she ought to have been invited to a disciplinary hearing.

Remedies

47. Overall, I find the disciplinary action taken against the Petitioner being a severe reprimand, a finding that she is unfit to serve in the Foreign Service and re-designation to the position of Public Communications Officer unlawful and consequently make the following orders:

- a) The letters dated 15th July 2015, 19th August 2015, 21st August 2015 and 26th October 2015 are

hereby quashed;

b) The re-designation and transfer are hereby reversed and the Petitioner is reinstated to her position of Foreign Service Officer I;

48. I find no basis for the claim for general damages which is hereby dismissed.

49. I award the costs of this Petition to the Petitioner.

50. These are the orders of the Court.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 2ND DAY OF SEPTEMBER 2016

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JUDGE

Appearance:

Mr. Nzamba Kitonga, SC for the Petitioner

Miss Chesinya for the Respondents