



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION NO. 41 OF 2013

PROF. DANIEL N. MUGENDI..... CLAIMANT

VS

KENYATTA UNIVERSITY1ST RESPONDENT

BENSON I. WAIREGI.....2ND RESPONDENT

ELIUD MATHIU.....3RD RESPONDENT

PROF. OLIVE M. MUGENDA.....4TH RESPONDENT

Donald B. Kipkorir for the Petitioner

Mr. Wetangula led by Mr Njoroge Regeru for the Respondents

JUDGMENT

1. The Petitioner filed an amended petition dated 30th July 2014 praying for orders;
 - i. That certiorari do issue that the compulsory leave notice dated 10th August 2011 and subsequent notices from the Respondents be quashed.
 - ii. That a declaration do issue that the Petitioner's rights have been violated.
 - iii. That a declaration do issue that any sections of the Kenyatta University Act Cap 210c and the statutes there under that violate the constitution are void to that extent.
 - iv. That an order of compensation do issue and that formal proof on quantum be gone into.
 - v. That the orders by the Respondents in suspending the Petitioner and all other proceedings thereafter be recalled and quashed by issuance of Judicial Review orders.
2. The Petition is based on the following grounds set out in the body of the petition and in the Supporting Affidavit of the Petitioner Prof Daniel W. Mugendi;
3. That the Petitioner was the Deputy Vice Chancellor (Finance, Planning and Development), Kenyatta University. That the Petitioner had a long standing disagreement with the 4th Respondent Prof Olive M. Mugenda the Vice Chancellor, Kenyatta University over *interalia*; the issue of research assistants, staff payroll, constructors and projects, financial management, money expenditure and the Petitioner's powers.

4. That on 4th August 2011, the Petitioner had an altercation with the 4th Respondent which the Petitioner discusses in a letter he wrote to the Chairman of the University, the 2nd Respondent herein dated 6th August 2011.
5. The Petitioner discusses an argument between himself and the 4th Respondent in his office over difference of opinion on payment of subsistence allowances to DVCS and the move by the Petitioner to discuss the matter with a Council member, Mr Mwaisaka Philemon without discussing the matter with her first. That the 4th Respondent shouted at him and accused him of insubordination on the matter.
6. That the 4th Respondent shouted continuously at him demanding to know if he, the Petitioner was the Vice Chancellor of Kenyatta University. The 4th Respondent then walked out of his office shouting at him at the top of her voice. She continued shouting at him while standing at the Secretary's office, she banged the Petitioner's door very hard and walked back to her office.
7. The Petitioner followed her to her office trying to explain himself. The 4th Respondent then started screaming asking why the Petitioner was following her. She instructed the security to call the security and ran to her office screaming and her three children were in the office. The Secretary came and the Petitioner insisted on talking to her but she declined.
8. The Petitioner states that he was confused by the incident and had done no wrong by preparing a paper for the Council with the proposals on the disputed allowances. The Petitioner raises various other grievances in the letter explaining to the Chairman the steps he had taken to minimize the disputes between himself and the 4th Respondent.
9. The Petitioner states that he is very supportive of the University and the 4th Respondent should grant him an enabling environment to fulfil his obligations. On 10th August 2011 the Petitioner was placed on compulsory leave on allegations that he had threatened the 4th Respondent with physical harm, disrespected the person and office of the Vice Chancellor and breach of protocol. In terms of the Memo by the Chairman of the Council dated 11th August 2011, the Petitioner was not allowed to undertake his administrative and academic responsibilities in the University or access any University premises/facilities.
10. Prof. Keren Mburugu was meanwhile appointed Deputy Vice Chancellor (Finance Planning and Development) in acting capacity. The Petitioner responded to the action taken by the Chairman vide a letter dated 7th August 2011, written to the Chairman of Kenyatta University Council. The Petitioner explained the events that took place on the material day, stating that he was a victim of the 4th Respondent and not the offender. The Petitioner protested that he was not invited to the General Purpose Committee meeting that took place on 9th August 2011 to deliberate the matter nor was the letter dated 6th August 2011 in which he had explained the matter tabled before the committee.
11. The Petitioner lamented that he was sent on compulsory leave based on one sided story by the 4th Respondent. That though the Petitioner was a member of the Committee he was not invited to attend the meeting nor given time to give his side of the story. The Vice Chancellor was part of the decision to send him on compulsory leave even though she was the accuser. The decision by the committee was not taken to the full Council for appeal as mandated under schedule 3(c) (2) of Kenyatta University statutes. The full Council was scheduled on 11th August 2011 but the letter of compulsory leave was received on the 11th August 2011, the same day.
12. The Petitioner was sent on compulsory leave on grounds of insubordination and gross misconduct. The Petitioner avers that the bar to access any University premises was a violation of his basic human rights and was aimed at disgracing and destroying his reputation that he had taken years to build. The memo was circulated to all staff members and posted in all notice boards in the university condemning the Petitioner in the eyes of over 3,000 employees and 38,000 students.

13. The Petitioner alleges that his rights and freedoms have been violated as follows;

- i. Right to fair administrative action that is lawful, reasonable and procedurally fair in contravention of Article 47(1) of The Constitution.
- ii. Right to have a fair public hearing and before an impartial tribunal in contravention of Article 50 (1) of The Constitution.
- iii. Right to presumption of innocence in contravention of Article 50 (2) (a) of The Constitution.
- iv. Was denied adequate time and facilities to prepare his defence in contravention of Article 50 (2) (c) of The Constitution.
- v. His right to be represented by an Advocate was denied in contravention of Article 50 (2) (g) of The Constitution.
- vi. His right to adduce and challenge evidence was denied in contravention of Article 50(k) of The Constitution.
- vii. His right to freedom of movement was violated in contravention of Article 39 (1) of The Constitution.
- viii. His removal was in violation of Article 236 (b) of The Constitution which removal violated both The Constitution and the Kenyatta University Act Cap 210c.

Respondent's Case

14. The 2nd Respondent the Chairman of the Council, filed a Replying Affidavit dated 22nd September 2011 in which he avers *inter alia*;

- a. That on 4th August 2011, the 2nd Respondent received a telephone call from the 4th Respondent concerning an incident that took place on 4th August 2011. The 4th Respondent complained that the Petitioner had harassed and intimidated her concerning a disagreement on an issue concerning the terms and conditions of service which the 2nd Respondent requested her to put in writing. The 4th Respondent was apprehensive of personal violence against her person from the Petitioner.
- b. On 9th August 2011 the 2nd Respondent convened a special meeting of the General Purposes Committee of the 6th Kenyatta University Council for purposes of considering the report of the incident reported by the 4th Respondent.
- c. On 8th August 2011, the Petitioner wrote a letter of complaint to the 2nd Respondent complaining of harassment and interference in his duties by the 4th Respondent on 4th August 2011.
- d. The General Purposes Committee sat in the absence of the Petitioner and took an interim decision to send the Petitioner on compulsory leave with effect from 9th August 2011 pending a disciplinary hearing on insubordination and misconduct by the Petitioner.

15. In her lengthy Replying Affidavit, the 4th Respondent states that the Petitioner was subject to the authority of the 4th Respondent by virtue of the University statutes and contracting. That the Petitioner had since 2008 a history of disrespect and insubordination against her outlined as follows;

- i. On 15th November 2008, the Petitioner wrote a rude letter to her stating *inter alia* that the Vice Chancellor was unable to control herself and to give dignity to the office.
- ii. On 19th May 2009, the Petitioner declined duties lawfully assigned and delegated to him by the Vice Chancellor.
- iii. Petitioner entered collaboration with the President of a foreign university namely Queensland University without reference to the Vice Chancellor.
- iv. An internal memo dated 19th July 2010 was written to the Petitioner on the matter. On 4th January 2011, the Petitioner was absent from work without informing the Vice Chancellor.
- v. Petitioner wrote an sms to the Vice Chancellor stating that it is not a favour for him to be given permission to be out of the University to Research.
- vi. On 4th August 2011, the Vice Chancellor went to the office of the Petitioner to discuss tabling of Terms and Conditions of Service approved by the Terms and Conditions of Service Committee of

the University Council, but the Petitioner categorically insisted that he would not table the items agreed at the Committee in the forthcoming University Council unless he was satisfied of the recommendations. That an argument ensued on the matter and the Petitioner followed the Vice Chancellor while she walked to her office. The Petitioner was upset and in unprecedented state of anger. That the Petitioner threatened to enter the Vice Chancellor's office by force and he asked the Secretary to call the security if they thought the Vice Chancellor was not safe.

vii. The Secretary called the security and it was then that the Petitioner left the Vice Chancellor's secretarial area of the office still agitated.

viii. The Vice Chancellor reported the incident to the Chairman of the Council the 2nd Respondent who requested the report be made in writing, a copy of which is produced dated 8th August 2011 marked 'POM2'

16. A special meeting of the General Purposes Committee of the University Council was convened on 9th August 2011 at which the Vice Chancellor was present and she reported the incident of 4th August 2011. The minutes of the meeting are annexed and marked 'POM3'.

17. It was agreed an interim decision to send the Petitioner on compulsory leave be taken. On 19th August 2011, the Vice Chancellor was invited to make representation to the special committee of the General Purposes Committee, minutes of which are attached and marked 'POM4'.

18. The Vice Chancellor is aware that the Petitioner was invited to make presentation to the Special meeting of the General Purposes Committee on 19th August 2011 per the minutes marked 'POM4'. The Petitioner attended with his legal representative who maintained that the Petitioner would not talk to the Special Committee and that he would file suit. The Committee proceeded with the disciplinary process and made its decision as per annex 'POM5'.

19. The main objection by the Petitioner to attend the meeting of 19th August 2011, was that Mr. Philemon Mwaisaka (a committee member) should not sit in the committee as he would prejudice the proceedings. The Vice Chancellor honoured the meeting and made her presentations to the committee. She tabled a document on physical threat on her and other incidents of insubordination from the Petitioner.

Analysis and Determination by the Committee

20 The Court has gone through these documents which are attached to the Affidavit of the Vice Chancellor.

The Court has also seen a warning letter dated 27th September, 2010 written to the Petitioner by the Vice Chancellor regarding insubordination, disrespect and chronic absenteeism. This theme persisted between the Petitioner and the Vice Chancellor culminating in the physical threat by the Petitioner against the Vice Chancellor on 4th August 2011, in front of the Secretary and the children of the Vice Chancellor who were at her office at the time.

21. The Vice Chancellor denied before the committee that she had shouted and screamed at the Petitioner while in the Petitioner's office. She said that at all material times the door to the Petitioner's office was open and the Secretaries and others would have witnessed any such screams.

22. The Committee decided to invite the Petitioner to a meeting on 23rd August 2011, to explain himself. The meeting took place as scheduled and the minutes are attached as annex 'POM5'. The purpose of the meeting was to investigate the threats by the Petitioner; lookup documented incident of insubordination by the Petitioner and make recommendations to the University Council. A report dated 24th August 2011 by the Special Committee of the General Purpose Committee of the Council is marked 'POM5'.

23. The Committee held four meetings in which they interviewed the Vice Chancellor and the Deputy

Vice Chancellor Prof Mugendi who declined to speak to the Committee and two senior secretaries.

24. The summary of the findings by the Committee are as follows;

- Documentation indicate several disagreements between the Vice chancellor and the Petitioner since 2008
- The Chairman had tried to resolve the differences
- The Petitioner lacked respect for the Vice Chancellor. The Petitioner frequently absented himself from work without permission.
- Petitioner wrote a rude 'sms' to the Vice Chancellor
- Petitioner planned to initiate a collaboration with the President of Queensland University without consulting the Vice Chancellor
- On 3rd January 2011, Pro Mugendi was absent without notifying the Vice Chancellor
- Pro Mugendi failed to attend performance contracting defense meeting despite being requested by the Vice Chancellor personally
- Prof Mugendi showed lack of good faith by insisting some member of the Committee keep off and when he appeared before the committee he refused to talk to the committee and instead asked his lawyer to address the committee. The lawyer indicated he had already referred the matter to the court.

25. **Held**

There were irreconcilable differences between the Vice Chancellor and the Deputy Vice Chancellor (FP&D). The two are unable to work together and this is detrimental to the smooth running of the University.

26. **Recommendation**

That there is a case of insubordination and gross misconduct and therefore the committee recommends that the University disciplinary process be initiated and concluded expeditiously in the interest of the University. The Vice Chancellor denies all the allegations by the Petitioner and in particular the Respondents have violated any of the Petitioner's human rights and fundamental freedoms. That the Petition has no basis and same be dismissed with costs.

27. **Determination**

The issues in dispute are:

- i. Whether the Respondents violated the Petitioner's constitutional rights and freedoms?
- ii. Whether the dismissal process adopted by the Respondents is void for breach of natural justice and the constitutional provisions?
- iii. Whether the dismissal process was in violation of the applicable statutory provisions and set out regulations?
- iv. What reliefs should be granted?

Issue (i)

28. From the facts before court the employment of the Petitioner as the Deputy Vice Chancellor (FP&D) has not been terminated. He was sent on compulsory leave pending investigations. The Petitioner declined to participate in the sittings of the Special Committee of the General Purpose and Development Committee of the Council in spite of being afforded opportunity to do so severally.

29. The Committee considered *vivavoce* and written presentations by the nemesis of the Petitioner, the Vice Chancellor. The Committee also considered the written explanations by the Petitioner sent to the Chairman of the Council prior to the commencement of the sittings by the Committee.

30. The Committee made the recommendations that a disciplinary process be commenced by the Council against the Petitioner for various offences identified in the report of the Committee.

31. The Court was referred to various authorities on the allegations that the Petitioner was denied the right to adduce and challenge evidence in contravention of Article 50 (1) and 50 (2) (c) of The Constitution.

32. That the statute IX Clause 2 of the Kenyatta University Calendar was also violated in that it provides that the University Council may terminate the Deputy Vice chancellor's office by giving him a six months' notice in writing.

33. That the Petitioner's freedom of movement was violated in contravention of Article 39 (1) of The Constitution by shutting his office at the University premises for the period of the compulsory leave.

34. The Court was referred by Counsel for the Petitioner to the case of **Malloch Vs Aberdeen Corporation [1971] 2 All ER 1278** at pages 1 -22, in which the house of Lords held;

“Where as here the common law position had been fortified by statute and additional protection given. In such a case the court should examine the framework and context of the employment to see whether elementary rights were conferred on the employee either expressly or by necessary implication. The right of a man to be heard in his own defence was the most elementary protection of all and where a statutory form of protection would be less effective if it did not carry with it the right to be heard it was not difficult to imply that, that right without affording the teacher a hearing, a responsible public body could not be said to reach a fair decision”,

35. The Court wholly embraces this proposition and as further enunciated by the High Court, at Nairobi in **Rose Wanjiru Mambo & 2 Others Vs Limuru Country Club & 17 Others [2014] eKLR** and by the Court of Appeal in **Stephen S. Pareno Vs Judicial Service Commission of Kenya (2014) eKLR** that a decision by an employer that is *ultravires* or contrary to the rules of natural justice cannot be allowed to stand and same is available to judicial review process and quashed accordingly.

36. Having said that the Peculiar facts of this case point to the contrary that the Respondents having considered the circumstances of this case thought it in the interest of maintaining good order and peace at the University to keep the Petitioner out of his employment by granting him compulsory leave pending the investigations of a serious matter involving the general security of the Vice Chancellor of the University.

37. Indeed having considered the facts of the case, the Court is of the considered view that it would have been impudent for the University Authorities to do otherwise. The Court embraces the reasoning by Lenaola J. in **Eliud Nyauma Omwoyo & 2 Others Vs Kenyatta University [2014] eKLR** where he held;

“I am in agreement with the Respondent that at that point in time, an action of some kind was required to be taken urgently and firmly in order to set the wheel of investigation in motion. Logically therefore I do not think that the Respondent ought to have given the Petitioners an opportunity to be heard given the circumstances at the time”,

38. The Court is not quick to judge the merits or otherwise of the contested facts touching on serious disrespect, insubordination and threats to physical violence on a superior by a subordinate officer but to say at this point, this is the sought of conduct for which an officer may be summarily dismissed in terms of section 44 of the employment Act 2007.

39. This indeed is the kind of conduct for which immediate suspension is warranted pending the conduct and conclusion of investigations and commencement of a proper disciplinary hearing against the accused employee.

40. The court cannot at this state fault the process and recommendations by the Special Committee of the

General Purposes Committee of Council of Kenyatta University. The meetings appear to have been convened and handled with good order and decorum and the recommendations in the reports dated 24th August 2011, are subject of discussion and possible ratification by the Council.

41. According to Article 47 (1) of The Constitution of Kenya

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”.

However, an employee must avail himself of these constitutional facilities. Where an employee refuses to participate in the administrative process without any reasonable justification he can only have himself to blame.

42. In **Jackson Butiya Vs Eastern Produce Ltd Cause No 335 of 2011**, which was cited with approval in **David Wahome Vs Schenker Limited [2014] eKLR** it was stated that;

“An employee who squanders the internal grievance handling mechanism provided by the employer cannot come to court and say “I refused to talk with those people and therefore I was not heard, order them to pay me. It is not the role of the court to supervise the internal grievance handling process between employers and employees. The role of the court is to ensure that such processes are undertaken within the law. In this case, I find that the Respondent followed the law but the Claimant failed to co-operate”.

I could not agree more with this rendition of the Law.

43. Furthermore, I agree with the decision of Lenaola and Ngugi JJ in the case of **Oluoch Dan Owino & 3 Others Vs Kenyatta University [2014] eKLR** where they held;

“The proceedings to which the Petitioners were subjected before the Students Disciplinary Committee were Quasi – Judicial in nature and they were entitled to the rights under Article 50(1). However the alleged violations of the provisions of Article 50 (2) cannot arise in the present circumstances”.

44. The court agrees that Article 50 (2) only applies to Criminal proceedings. Furthermore, the right of a party to be represented in Quasi-judicial proceedings was dealt with by the learned Judges thus;

“The right of a party to be represented by counsel in Quasi-judicial proceedings such as the Petitioners were subjected to is well recognized but is subject to the rule of procedure of the tribunal to which a party is appearing before and must be requested for before a violation of the right to legal representation can be alleged”.

45. Clause 23 of statute XIV of Kenyatta University provides;

“In the case of academic and senior administrative staff and all other staff this power (disciplinary) shall be exercised for the reasons, on the ground and in in the manner pursuant to the procedure set out in the regulations which procedures shall include the following rights for the member of staff. (ii) To be represented by a person of his choice from among the member of academic and senior administrative staff”

46. In this case, counsel for the Petitioner was allowed to address the committee but the Petitioner declined to speak in person. The Petitioner cannot be heard to say that his right under Article 50 (1) was violated by the Respondents.

47. The Petitioner having refused to give *vivavoce* evidence before the Committee cannot now be heard to say that the recommendations were made in violation of his human rights. Perhaps if he had made his case to the committee, the fears that led to his being placed on compulsory leave would have been allayed

pending the Constitution of the disciplinary process proper. This can now only be a matter of speculation, the blame of which lay at the Petitioner's door. The Court therefore finds that the Respondent's did not violate any of the Articles of the Constitution cited in the body of the petition and in particular Article 50(1). With regard to the issue of freedom of movement, no sufficient grounds have been adduced to show that the Petitioner's right to freedom of movement under Article 39(1) was violated. Employment and Labour Law allows restrictive measures to be imposed on an employee the subject of investigations for serious misconduct. It was lawful to place the Petitioner on compulsory leave pending constitution of investigations and the recommended disciplinary process.

Issue II

48. At this, stage there is no evidence that the Council of Kenyatta University, which has the mandate to dismiss the Petitioner from his employment has the intention to dismiss the Petitioner from his employment.

49. A recommendation by a special committee of the General Purposes Committee of the Council is yet to be placed before the Council for consideration. This may be followed by an adoption of the report with or without modification or rejection altogether.

50. It is therefore, an exercise in speculation to make a finding on the merits or otherwise of the process the Council is likely to undertake henceforth.

Issue III

51. As stated herein before, the Petitioner has not been dismissed from employment. There is no evidence before Court that the Respondents have violated any applicable statutory provisions in the yet to commence disciplinary process of the Petitioner. The Jury is still out there depending on the subsequent course of events.

52. The Court will only caution the Respondents to deal with the matter expeditiously to avoid keeping the Petitioner in limbo and strictly adhere to the guiding statutes and the law. Kenyatta University is a large national institution and it is possible for officers who for whatever reason are unable to work together to be deployed in other areas that may mitigate such conflicts. Separation is not always the necessary and reasonable outcome of personal conflicts such as this one.

Dated and Delivered at Nairobi this 28th day August, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE