



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 52 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 8th October 2015)

**DENNIS MOTURI ANYOKA
PETITIONER**

VERSUS

**KENYA REVENUE AUTHORITY 1ST
RESPONDENT**

COMMISSIONER GENERAL 2ND RESPONDENT

**SENIOR DEPUTY COMMISSIONER – HUMAN RESOURCES 3RD
RESPONDENT**

JUDGMENT OF THE COURT

1. The Petitioner filed this Petition on 20/8/2014 through his Advocate Achach & Company Advocates. The Petition was filed by the Petitioner alleging contravention and/or enforcement of fundamental rights and freedoms of the individual as enshrined under Acts 25, 27, 28, 33, 41, 47, 48 and 50 of the Constitution and principles of fairness, reasonableness and legitimate expectation.

The parties

2. The Petitioner is an adult male of compos mentis, a public servant based in Nairobi within the Republic of Kenya holding the position of a Revenue Officer I with the 1st Respondent herein. The Respondent is a body corporate with perpetual succession and a common seal, established under Section 3 of Kenya Revenue Authority Cap 469 Laws of Kenya and acts as an agent of the Government for purpose of collection and receipt of all revenue. 2nd Respondent is an officer of 1st Respondent and 3rd Respondent in an officer of 1st Respondent herein charged with the responsibility of implementing polies which includes among others the Disciplinary Policy that that ensures compliance to the bill of rights as envisaged under Section 8 of the Policy documents.

Petitioner's case

3. The Petitioner avers that he was employed by the Respondent in January 2008 as a Revenue Officer and currently deployed at the Custom Service Department at Jomo Kenyatta International Airport. He avers that he has been executing his duties diligently and in accordance with the law. However, by a letter dated 21/1/2012 referenced Conf/7957, the Respondent informed the Petitioner of charges against him being soliciting bride which they termed as gross misconduct and against Section 6.2.2.2.2 of the Kenya Revenue Authority Code of Conduct.
4. That due to the aforesaid allegations, he was informed that serious disciplinary actions were to be preferred against the Petitioner and he was given 14 days to show cause why the intended disciplinary action should not be taken against him, but in the meantime he was placed on interdiction. On interdiction, the Petitioner was paid half basic salary with full house allowance. Other allowances were excluded.
5. The Petitioner avers that on 1st February 2013, he submitted a reply to his notice to show cause why the said disciplinary action should not be taken against him. It is the Petitioner's position that todate, the Respondents have not replied to the said letter of 1st February 2013 neither have they demonstrate any intention whatsoever to waive the said disciplinary action.
6. On 8th January 2014, the Petitioner complained through his agent of the delayed justice and the long duration the matter had taken to be handled. The Respondents didn't respond to this letter of 8th January 2014.
7. The Petitioner avers that he has always visited the 1st Respondent's premises through the 3rd Respondent's office but has never been informed of anything substantively relating to the disciplinary action, than being asked to sign a register and walk away. The Petitioner avers that he is aware out of discussions with employees of the 1st Respondent that there are employees of the said Respondent who were interdicted and/or suspended after the Petitioner herein and their disciplinary process has since been concluded by the 1st Respondent.
8. It is the Petitioner's contention that he is entitled to equal protection and equal benefit of the law including full and equal enjoyment of all rights and fundamental freedoms. He avers that the Respondents' actions of failing to conclude a disciplinary inquiry and/or proceedings about 2 years after their commencement are illegal and unlawful and contravenes the relevant law and are unconstitutional.
9. The Petitioner has submitted that the Respondents herein have only conceived a scheme to punish him without hearing him out by interdicting him and letting him out of the office indefinitely with half salary which never reaches the Petitioner's account following a consent order in Petition No. 29 of 2013 to the effect:

“By consent, matter is marked as settled and any document not supplied to the Petitioner shall not be used as evidence against the Petitioner”.

10. The Petitioner has also submitted that there is no meaningful document given to him from the Respondent other than his own documents that he had annexed to his defence on 1st February 2013 and that to his defence on 1st February 2013 and that the Respondents know that there is no case against him as charged and that if any disciplinary proceedings were to be conducted, the Petitioner shall be cleared of all charges.
11. The Petitioner submits further that the Respondents have intentionally failed to conclude the disciplinary process so that the Petitioner fails to get an opportunity to seek deletion of information that is misleading and untrue relating to the charges leveled against him as envisaged under Article 35 (2) of the Constitution of Kenya.
12. The Petitioner also avers that the disciplinary procedures and policies of the 1st Respondent are subject to the Constitution of Kenya and the relevant employment law of Kenya. However that the

Respondents disciplinary procedures and policies are silent on how long it should take for a disciplinary committee to be constituted and the case heard and determined.

13. It is therefore the Petitioner's position that the acts and omissions of the Respondents complained of are unreasonable, unfair, irrational and in breach of the Petitioner's legitimate expectation to a process that is procedurally fair, constitutional and legally sound.

14. The Petitioner therefore seeks the following prayers:

1. ***A declaration that the Respondents' said action and/or inaction complained of offend, violate, transgress upon and/or threaten to offend, violate and transgress upon the Petitioner's freedom of expression and the right to information as enshrined in Article 33, 35(10 (a) and 35(2) of the Constitution of Kenya 2010;***
2. ***A declaration that the Respondents' said action and/or inaction complained of offend, violate, transgress upon and/or threaten to offend, violate and transgress upon the Petitioner's right to Fair Administrative Action that is expeditious, efficient, lawful, reasonable and procedurally fair as enshrined in Article 47(1) of the Constitution of Kenya 2010;***
3. ***A declaration that the Respondents' said action and/or inaction complained of offend, violate, transgress upon and/or threaten to offend, violate and transgress upon the Petitioner's right to fair hearing as enshrined in Article 50 (1) and (2) of the Constitution of Kenya 2010;***
4. ***A declaration that the disciplinary procedures and policies of the 1st Respondent in so far as they permit the Respondents to take over one year to constitute a disciplinary committee to hear and determine disciplinary cases is illegal, unconstitutional, null and void.***
5. ***An order of mandamus, compelling the Respondents herein either by themselves, employees, servants and/or agents to constitute the Disciplinary Committee, hear the Petitioner's case and expeditiously determine the same in accordance with the disciplinary procedures of the Respondent and the relevant laws.***
6. ***General damages.***
7. ***Costs of the Petition.***

Respondents Case

15. The Respondents filed a replying affidavit and submissions in respect of this Petition. The replying affidavit was filed on 25/2/2015 having been deposed to by one Crispine Agata the 1st Respondent's Human Resource Department Manager.

16. The deponent has deposed that the Petitioner being an employee of the 1st Respondent, was employed to assist in the performance of 1st Respondents' statutory duties and subject to 1st Respondent's Code of Conduct. However, the 1st Respondent deposes that while in the course of employment, the Petitioner unlawfully solicited and received 40,000/= as a bribe from an unlicensed clearing and forwarding agent a Mr. Martin Jacob Ocholla to facilitate clearance of a motor vehicle registration No. KBR 702P/ZC1316 ferrying undeclared raw imported timber from DR Congo using a false customs entry. (Appendix CA1) is a letter from Attorney General Aburili and Company Advocates that gave rise to the investigations by the 1st Respondent.

17. The deponent has further deposed that this action by Petitioner was serious amounting to a gross misconduct which led to the Petitioner being interdicted. Under Section 6.2.2.2 of 1st Respondent's Code of Conduct, investigations were commenced and the Petitioner was served with a show cause letter on 21/1/2012. On 7/3/2013, the Petitioner's Department published her report concerning the indecent. Then on 24/5/2013, the Petitioner filed a Constitutional Petition

- No. 270/2013 seeking an order of Mandamus to compel the Respondents to furnish him with the documentary evidence relating to the charge of soliciting bribe. The documents requested were furnished on 24/6/2013 as per Appendix CA7. This Petition 270/2013 was however settled by consent.
18. The 1st Respondent's representative also depones that contrary to the Petitioner's assertion, the 3rd Respondent has sought to have the case heard and determined by the Disciplinary Committee at the earliest opportunity and meetings have been scheduled to be held on various occasions. However, they have not taken off for various reasons ranging from lack of quorum or a long hearing list, busy schedule of members.
19. The 1st Respondent agrees that in their Code of Conduct paragraph 8.2.7, the cases of interdiction will be determined within six months as much as may be possible. That they are in process of reviewing the Disciplinary Process in order to expedite all the disciplinary hearings pending before the Disciplinary Committee.
20. The deponent depones that the Petition is premature and seeks to anticipate the outcome of the disciplinary hearing even before the Disciplinary Committee sits for hearing. They further depone that the Petitioner is guilty of material non-disclosure and has not disclosed to this court that he is an advocate of the High Court of Kenya and has since 2013 been engaged in the firm of Achach and Company Advocates.
21. The Respondents have submitted that the prayers (a), (b), (c) and (e) of the Petition have been overtaken by events because on 26th March 2015, the Petitioner's disciplinary hearing was set down for hearing and the same proceeded and a determination will be made on notice. They therefore submit that since court do not grant orders in vain, the said prayers can't be granted at this point as there is no threat of violation of the Petitioner's rights, the same having been eliminated. They cited ***Commission for the Implementation of the Constitution vs Attorney General and Another (2013) eKLR*** to buttress this argument.
22. They have also argued that there has not been unreasonable delay in calling for a disciplinary hearing for the Petitioner in light of the circumstances.
23. They deny that the Petitioner's rights were violated as they have followed the stipulated procedures in carrying out their investigations and subsequent dealing with the Petitioner. They deny violating Article 47 of the Constitution. Given the nature of the matter under investigation, the nature of competing interests and the impact of the decision to be made. In this case they have to weigh the rights of the Petitioner to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair against their considerable investment in the Petitioner in whom they have invested over 2 million in a period of 2 years vis a vis the offence of soliciting for a bribe and the impact on other employees of the Respondent accused of soliciting or receiving a bribe.
24. The Respondents further submitted that the Petitioner should not be awarded any damages as no rights have been infringed upon.

Issues for determination

25. I have considered the evidence presented before me and the submissions made by both parties and I narrow down issues for determination as follows:
- a. ***Whether there has been unreasonable delay in calling for a disciplinary committee hearing in the circumstances of the Petitioner and thus violating his constitutional rights.***
 - b. ***Whether the prayers sought can be granted and if so which ones.***

26. On the 1st issue, the chronology of events are a pointer as to whether there has been unreasonable delay or not. From the Petitioner's submissions, he was interdicted vide a letter dated 21/1/2012 reference number Conf/7957. He was informed of the charges being leveled against him being soliciting for a bribe which Respondent termed as a gross misconduct. He was given 14 days to respond and show cause why disciplinary action should not be taken against him. He made his submissions on this on 1st February 2013.

27. Now from February 2013 to the time of filing this Petition on 20/8/2014, it is apparent that no disciplinary committee has sat to determine the Petitioner's case. In the Respondents own submissions, the 1st meeting was finally held on March 2015 and even in this a determination is yet to be made at the time of this judgment. The period from the time of interdiction to date is over 2 years now, 2 years 8 months to be precise.

28. Courts will normally not interfere with the internal disciplinary processes of organization as this will be tantamount to micro managing them. However where the internal proceedings seem marred with allegations, the arm of the law will be called upon to act.

29. The Respondents have submitted that their own discipline policy states as follows:

“8.2.7- cases of interdiction will be determined within six months as much as may be possible.”

The Respondents have submitted that this clause envisages a position where the Respondents can exceed 6 months before determining cases of interdiction given the severity of the complaint.

The question to be asked by this court is whether holding onto such a case in excess of 2 years is still a reasonable time?

30. Article 47(1) of the Constitution of Kenya 2010 states that:-

“(1) Every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action the person has a right to be given written reasons for the action”.

31. The Respondents have submitted their inability to handle the Petitioner's case as per their own disciplinary procedures within 6 months citing various reasons. The reasons include heavy work load for the committee, busy schedule of members of the Committee etc. The law is clear that any administrative action must be expeditious and efficient. It is apparent that the administrative action by the Respondent is neither expeditious or efficient given their inability to handle the Petitioner's case as envisaged by law. Given the time lines of 6 months, a delay of an excess of 3 months or at most 6 more months will be acceptable but to extend court for over 2 years is unreasonable and procedurally unfair and the Respondent cannot be excused for their ineptitude.

32. However complex the case may be, there has been inaction on Respondents side. Even Article 47(2) - of giving written reasons for their action or inaction was not accorded to the Petitioner.

33. This court finds that indeed the Petitioner's rights under Article 47(1) and (2) of the Constitution of Kenya has been infringed upon and declares so.

34. Other provisions of the Constitution have also been infringed upon and this includes Article 50(1) of the Constitution which states:

“A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or

a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.”

35.It is the duty of the court to uphold and enforce constitutional rights and under Article 23(3) can give various reliefs including an order for compensation.

36.Having found as above, I find that the rights of the Petitioner have been infringed upon and I grant him damages equivalent to the other half of his withheld salary and allowances from the time of interdiction to date. This does not preclude the Petitioner from being paid his entitlements after the completion of the disciplinary process depending on the outcome of the same.

37.Since the Respondents have indicated that the disciplinary hearing has already been held, it will be superfluous to grant any orders compelling the holding to the same. I however note that the Committee has not rendered its verdict which I direct should be rendered within 14 days of this judgment.

38.The Respondent shall pay costs of this Petition.

Read in open Court this 8th day of October, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mimma holding brief for Achach for Petitioner

No appearance for Respondent