



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI  
PETITION NO.58 OF 2015**

**JOHN MUCHINA KIMEMIA ..... PETITIONER**

**VERSUS**

**THE CHAIRMAN, PUBLIC SERVICE COMMISSION..... 1<sup>ST</sup> RESPONDENT**

**THE MINISTRY OF HEALTH AND PUBLIC HEALTH & SANITATION.... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

1. The Petition herein was filed on 6<sup>th</sup> December 2013 before the High Court, constitutional and human rights division as Petition No.576 of 2013. The file was transferred to this Court as here vide directions made on 23<sup>rd</sup> June 2015.

2. On 7<sup>th</sup> March 2013 and 29<sup>th</sup> January 2015, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent respectively were served, such service has been acknowledged and Kennedy Ingunza filed Affidavit of Service on 4<sup>th</sup> June 2015 in this regard. Further service was effected upon all the Respondents on 22<sup>nd</sup> June 2015 for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent while the 3<sup>rd</sup> Respondent was served on 18<sup>th</sup> June 2015. Subsequent service has been effected vide notices acknowledged on 25<sup>th</sup> June by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents and 2<sup>nd</sup> July for the 2<sup>nd</sup> respondent.

3. Despite service on three different occasions, the Respondents did not enter appearance, did not file any records and also failed to attend court. On 14<sup>th</sup> July 2015, the Petitioner was directed to file written submissions. This was done on 5<sup>th</sup> August 2015.

**The petition**

The Petitioner is seeking for orders that;

- a. *A declaration that the dismissal from service to be found to be illegal and be reviewed and other decisions thereof be set aside.*
- b. *A declaration that the Respondents do pay the Petitioner compensation for suffering anguish and lost earnings for the entire period he has been out of employment*
- c. *A declaration that the Appellant [Petitioner] be reinstated to the employment of the Public Service Commission under permanent and pensionable terms stipulated thereof*
- d. *A declaration that the Appellant [Petitioner] be awarded costs.*

4. The Petitioner being trained as a Public Health Officer has sued the Respondents as the body tasked

with all human resource affairs for the government, the line ministry and principal legal advisor to the government respectively. The basis of the Petition is that the petitioner's rights for fair trial; equality before the law; fair administrative action; access to justice under article 25, 27, 47, 48 and 50 of the Constitution have been violated.

5. The case is that on 15<sup>th</sup> December 1994 the Petitioner was employed under the 1<sup>st</sup> Respondent as a Public Health Officer under Divisional Public Health Officer, Kamwangi Division in Thika as a Public Health Technician. On 17<sup>th</sup> December 2003 the Petitioner was arrested and charged before Gatundu Court with occasioning and or causing actual bodily harm to Eunice Njeri Kamau and was then held in custody until 19<sup>th</sup> December 2003 when he was charged and released on bail. The Petitioner resumed work but in May 2006 his bail was withdrawn and committed to jail for life by Gatundu Court upon the finding that he had doused the complainant with fuel and set her alight with the consequences that there were severe injuries. The Petitioner was under the assumption that the District Health Officer Thika would have written to the line ministry, the 2<sup>nd</sup> Respondent with regard to the criminal charges the Petitioner had but this was not done. The Officer instead wrote a misleading letter noting that the Petitioner had absconded duty leading to the stoppage of salary and eventual dismissal from service.

6. The case is also that on 10<sup>th</sup> April 2006 the Petitioner received a letter informing him that action would be taken against him for absconding duty as this was in gross misconduct. On 3<sup>rd</sup> July 2006 a letter was sent to the 2<sup>nd</sup> Respondent permanent secretary to stop the salary of the petitioner. On 7<sup>th</sup> November 2008 the Petitioner received a letter from the 2<sup>nd</sup> Respondent stating that his salary had been stopped from 2006. That vide letter dated 18<sup>th</sup> February 2008 the Petitioner was dismissed from service with effect from 16<sup>th</sup> December 2006 on account of gross misconduct. By this letter the Petitioner lost all his terminal benefits and had he been retired, he would not have lost such benefits. The Petitioner was then required to appeal within six (6) weeks.

7. On 1<sup>st</sup> October 2008 the High Court set aside the judgement of Gatundu Court and directed that the Petitioner should go through a retrial but the Petitioner remained in custody. During the retrial, the complainant refused to attend court. On 19<sup>th</sup> December 2011 the Petitioner was released under the provisions of section 87(a) Criminal Procedure Code and pending the tracing of the complainant. Upon release the Petitioner reported to work at Thika Hospital but learnt that the district boundaries had changed and was moved the Gatundu District. On 5<sup>th</sup> December 2008 the Petitioner got a copy of his dismissal letter and only then he realised he had been dismissed without a hearing. On 26<sup>th</sup> June 2012 his appeal was dismissed and on 11<sup>th</sup> October 2006 he filed a second appeal which was never heard.

8. The Petition is that the 1<sup>st</sup> Respondent dismissed the petitioner's case and employment before giving him access to justice and his right to be heard and without allowing him to make a personal appearance and by relying on mere correspondences acted arbitrarily. Despite writing to the 1<sup>st</sup> Respondents severally arguing his case, he has not been given a chance thus denied fair trial and contrary to the provisions of article 48, 50 and 25 of the constitution. That the Respondents acted without being aware of the petitioner's circumstances, made conclusions without giving him a chance to be heard and relied on information that was not reasonable. This was contrary to natural justice, equity and contrary to his fundamental rights as under the constitution.

### **Submissions**

9. The Petitioner submitted that due process was not followed in this dismissal from employment. He had served for over 12 years under the 2<sup>nd</sup> Respondent and when he was charged with a criminal offence his supervisor failed and or neglected to inform him his employer about his circumstances and gave misleading information that he had absconded duty. That the Respondents proceeded and dismissed him without due process or making an inquiry into the petitioner's circumstances. There were therefore material facts that were never disclosed as held in **Brink's-Mat Ltd versus Elcombe & Others [1988] 3 All ER 188**. Therefore when the Respondents wrote letter dated 18<sup>th</sup> February 2008 dismissing the Petitioner with

effect from 16<sup>th</sup> December 2006, on account of gross misconduct, he thus lost all rights to his terminal benefits and had he been retired from employment, he would have earned such benefits. Such dismissal was contrary to article 25 of the Constitution as he was not given a fair chance for hearing of his case and contrary to the rules of natural justice as held in **The Management of Committee of Makondo Primary School and Another versus Uganda national Examination Board, HCC Misc. Applc. 18 of 2010**. Despite the Petitioner filing a second appeal, this was not heard at all. That access to justice and fair administrative action requires that before a public body can make a decision advance to a party, such a party must be heard.

10. The Petitioner also submitted that his supervisor had a duty to report his whereabouts to avoid a dismissal. That fair administrative action requires that before taking an advance decision, the subject person should be given a fair hearing as held in **President of the Republic of South Africa & Others versus South Africa Rugby Union & others**. In this case the Petitioner was under the assumption that his supervisor and District Public Health officer Thika was under a statutory duty to report his whereabouts to his employer but he failed to do so. This officer instead wrote a misleading letter that the Petitioner had absconded duty which was not the case.

11. The Petitioner is seeking compensation for his wrongful and illegal dismissal from service by the Respondents having suffered irreparable loss and damage from 2006. The Petitioner has relied on the case of **Amraphael Mbogholi Msagha versus Chief Justice & 7 Others HCCC Misc. Applc.1062 of 2004** where the Court held that where a decision-maker deprives himself of the views of the person who will be affected by the decision, it is unfair and such is not a proper decision. The Petition should therefore be allowed with costs.

### **Determination**

12. As noted above, the Respondents did not enter appearance or file any documents. That notwithstanding, the Petition as set out and based on various provisions of the Constitution shall be assessed on merits.

13. The challenge here is that the Petitioner was dismissed unconstitutionally and that his rights under articles 25, 27, 47, 48 and 50 of the Constitution have been violated. The Petitioner is seeking that he should be compensated for the violation of his constitutional rights and reinstated back into service.

14. I will go beyond the issues raised by the Petitioner in terms of the stated violations under the Constitution as concerns article 25, 27, 47, 48 and 50. The rationale here is that the relationship between the Petitioner and the Respondents is his employment service that has since been terminated. The termination took effect on letter dated 18<sup>th</sup> February 2008 noting that the Petitioner absconded duty and thus he was dismissed with effect from 16<sup>th</sup> December 2006. Subsequently, an appeal against this dismissal was dismissed vide letter dated 26<sup>th</sup> June 2012.

15. Despite this being a petition, the cause of action arose within an employment relationship. In this regard, employment is regulated by both the constitution, 2010 and various statutes and the employment contract and policy regulations of the employer. The Petitioner has admitted that on 17<sup>th</sup> December 2003 he was arrested and then charged with a criminal offence, he was arraigned in Court at Gatundu and released on bail. However in May 2006 he was convicted for life and committed to jail.

16. Therefore with the above facts admitted, as of May 2006, the Petitioner was held in custody and could not report to work. He was dismissed with effect from 16<sup>th</sup> December 2006 even though this decision was only communicated on 18<sup>th</sup> February 2008.

17. As held by this Court in the case of **Severine Liyali versus The Cabinet Secretary Ministry of Foreign Affairs and Trade & Others, Petition 33 of 2014**;

*There is now a fundamental shift in the labour relations environment in Kenya with the enactment*

*of the Employment Act, 2007 and the Constitution, 2010. Employees, without distinction as to whether they are in the public or private sector now enjoy a protective labour environment that was not always the norm before. Employers both in the public and the private sphere enjoy rights now regulated under the law and the Constitutions. But things were not always like this. ...*

18. With regard to the rights of the Petitioner as an employee formerly employed by the Respondents, article 10 of the Constitution stipulates that the actions taken against him must meet the set values and principles. Such provisions are given more detail under Article 47(1) which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and under sub-article (2) it is provided that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. Sub-article (3) provides that Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall (a) provide for the **review of administrative action by a Court** or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.

19. That said, the constitutional and statutory duty to provide fair administrative action depends on the circumstances of each case. With regard to procedural fairness, a decision maker must ensure that there is adequate notice, opportunity to make a presentation, issuance of a clear statement of the administrative action to be taken, notice of any right of review of appeal and notice of the right to request reasons for the decision/s made. Once such elements are met, prima facie, the decision taken is deemed lawful and reasonable. This is the rationale set out under section 43 of the Employment Act thus;

*43. (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.*

*(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.*

20. All what an employer is required to have before terminating an employee is that there are reasons that warrant termination which reasons the employer at the time genuinely believe to exist so as to justify the termination. Beyond having such reasons, it is further required that such reasons must be valid and fair;

*(a) That the reason for the termination is valid;*

*(b) That the reason for the termination is a fair reason—*

21. All things equal and well done, fair procedure must be applied before any advance decision can be applied. To therefore ensure that the subject employee is accorded due process, reason must be given to the circumstances of each case as set out above. The law therefore sets certain parameters. In employment and labour relations, the Employment Act, 2007 and the repealed Employment Act, Cap 226 Laws of Kenya, set out matters where committed permit an employer to take summary action. In both statutes, the present and the repealed, the seminars here can be traced to section 44(4) of the Employment Act, 2007 thus;

*(4) Any of the following matters may amount to **gross misconduct so as to justify the summary dismissal of an employee for lawful cause**, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—*

22. The law set out some instances that warrant summary action of dismissal;

a. Absence from work;

- b. Intoxication while at work;
- c. Neglect of work
- d. Use of abusive and insulting language
- e. Failure to obey lawful orders/directions given by the employer

*(f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or*

*(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.*

23. Therefore, as set out by statute, where an employee is arrested for a cognisable offence and is punished with imprisonment and is not released within 14 days on bail or bond, such an employee is lawfully held and no longer available to the employer to undertake duties as required, directed of duties to be undertaken and performed under the employment contract. In this regard it is not the employer at fault. The employee is simply not available due to the arrest and retention in custody due to criminal culpability. In this case, as set out in the petition, the Petitioner was charged on matters not related to his employment and convicted for life. From May 2006 he was only released on 19<sup>th</sup> December 2011 under the provisions of section 87(a) of the Criminal Procedure Code which release in law is conditional and not an acquittal. For a period of over 4 years, the Petitioner was not available for service with the Respondents.

24. It cannot therefore be the fault of the petitioner's supervisor, the District Public Health Officer Thika to communicate to his employer about his circumstances. Such circumstances as set out by the Petitioner were that his liberty was restricted. He did not report to his duty station. He did not communicate to his employer about his whereabouts. Even when the Petitioner remained out on bail from 19<sup>th</sup> December 2003, he does not outline what he did so as to bring to the attention of his employer about his circumstances and the chances that he was faced with a conviction. Had the Petitioner been keen to retain his terminal dues, he had the option to resign his employment and earn the same. Once he remained on trial and awaited his conviction, this was his personal challenge and not that of his supervisor or employer. The duty was vested upon the Petitioner to act as appropriate to protect and secure his terminal benefits. This cannot be the duty of the supervisor or the Respondents.

25. The Petitioner has heavily relied on the case of **Amraphael Mbogholi Msagha versus Chief Justice & 7 others**, however the circumstances in this case are way different as against this petition. The decisions taken in the claimants case related to his absence from work due to a criminal conviction, the Petitioner remained in custody while in the other case related to the legality of the appointment of a tribunal to investigate under the provisions of section 62(5)(b) of the repealed constitution. In the petitioner's case, being in custody over matters that had nothing to do with the employer, he was not available to be allocated work or do his work as required. Similar findings were made in the case of **Joseph Mutuura Mberia & Another versus The Council Jomo Kenyatta University of Agriculture and Technology (JKUAT) Cause No.1587 of 2013;**

*... an employer is at liberty to commence disciplinary proceedings against the employee and it is the duty of the employee to justify in the administrative disciplinary process the continuation of his employment. However where the Court establishes that such administrative disciplinary proceedings are commenced with ulterior motive or as a process shrouded with illegalities, then the Court must intervene and stop such an illegality.*

26. The Petitioner does not state that the Respondents acted with malice or outside the required parameters of fair administrative action as even under article 25, 47 and 50, the actions taken by any officer or employer in this case, must have a basis. As set out above, the law under the circumstances of the Petitioner allowed for summary action. The contestation by the Petitioner that his supervisor had a statutory duty to tell his employer about his whereabouts, I find to lack any legal basis or justification.

Such an expectations lacks legitimacy and remains a mere assumption. It has no constitutional or legal basis. That was not a role bestowed upon such an officer, the Divisional Public health Officer Kamwangi or District Health Officer Thika to undertake.

27.I therefore find no violations against the Petitioner under any provision of the Constitution or the law. The only dues he is entitled to are salaries that the claimant should have earned until the date of termination. These are legally due to him as of right. The delay in the communication by the Respondents with regard to the decision to dismiss him and eventual dismissal of his appeal on 26<sup>th</sup> October 2012 and nothing that the Petition herein was filed on 6<sup>th</sup> December 2013, the salaries due up and until the 18<sup>th</sup> February 2008 are due.

**Remedies**

28.On the remedies sought, compensation is not due on the basis of the Court findings that there were not constitutional or statutory violations. The remedy of reinstatement is given in very exceptional circumstances. Such must be mitigated by the party so claiming but in this case such is not due noting the findings above and the time lapse.

29.With regard to the salaries due, Petitioner does not state when his salary was stopped. It was his duty to set this out. He is only entitled to his salary until the date of termination, 18<sup>th</sup> February 2008. As I lack the basis to analysis such dues herein, the right set out, none will be awarded herein.

30.Despite the Respondents not entering appearance, there will be no orders to costs.

**In conclusion, based on the above findings, The Petition herein is dismissed.**

**Orders accordingly.**

**Delivered in open court at Nairobi and dated this 4th day of December 2015.**

**M. Mbaru**

**JUDGE**

In the presence of:

Lillian Njenga: Court Assistant

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