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| Case Number: | Petition 33 & 32 of 2015 (Consolidated) |
| Date Delivered: | 15 Sep 2016 |
| Case Class: | Civil |
| Court: | Employment and Labour Relations Court at Kisumu |
| Case Action: | Judgment |
| Judge: | Maureen Atieno Onyango |
| Citation: | Consolata Nabwire Wakwabubi & another v Governor, County Government of Bungoma & 2 others [2016] eKLR |
| Advocates: | - |
| Case Summary: | - |
| Court Division: | Employment and Labour Relations |
| History Magistrates: | - |
| County: | Kisumu |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Petition dismissed |
| History County: | - |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |
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REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 33 OF 2015

AND

PETITION NO. 32 OF 2015

(CONSOLIDATED)

(Before Hon. Lady Justice Maureen Onyango)

CONSOLATA NABWIRE

WAKWABUBI.....1ST PETITIONER

EVANS JUMA

**FWAMBA.....2ND
PETITIONER**

-Versus-

**GOVERNOR, COUNTY GOVERNMENT OF BUNGOMA.....1ST
RESPONDENT**

COUNTY SECRETARY, COUNTY GOVERNMENT OF BUNGOMA.....2ND RESPONDENT

**COUNTY PUBLIC SERVICE BOARD, BUNGOMA3RD
RESPONDENT**

JUDGEMENT

The two petitions before me for determination were filed by Consolata Nabwire Wakwabubi (Petition No.33 of 2015) herein after called the 1st Petitioner and Evans Juma Fwamba (Petition No.32 of 2015) herein after called the 2nd Petitioner.

The 1st Petitioner was employed by Bungoma County Public Service Board as Chief Officer Public Administration on 11th March, 2014. She was thereafter transferred to the office of Chief Officer, Gender and Culture.

The 2nd Petitioner was employed by Bungoma County Public Service Board, the 3rd Respondent as Chief Officer, Tourism on 11th March, 2014 and was later transferred to the office of Chief Officer, Housing and Sanitation.

The 1st Respondent is the County Governor, Bungoma County and the 2nd Respondent is the County Secretary, Bungoma county Government. The 3rd Respondent is the Public Service Board, Bungoma County.

1st Petitioners Case

The 1st Petitioner was employed by the Bungoma County Public Service Board, the 3rd Respondent, on 11th March 2014. On 3rd September, 2015 she received a letter of suspension on the following grounds;

1. Allegations on the mismanagement of the Ministry's funds based on the Governor's report.
2. Alleged fraud and falsification of documents in a workshop held in Kisumu on 7th July, 2015.
3. Disturbing reports through the media and other sources that three (3) of the County vehicles were detained in hotels in Eldoret for non-payment.

By a letter dated 16th October, 2015 she was invited to appear before a special ADHOC Committee Meeting at the Office of the Director Human Resource Management on Wednesday 21st October, 2015 at 11 am "to provide some information." When she appeared before the committee she was surprised to learn that it was a disciplinary hearing.

On 5th December, 2015 she learned from the print media that her appointment had been terminated.

Aggrieved by the termination she filed petition number 33 of 2015 seeking the following reliefs -

- (i) **A Declaration Order** that the 1st and 2nd Respondent have no jurisdiction to submit the Petitioner into disciplinary procedure and dismiss him from employment be made.
- (ii) **An order of prohibition** prohibiting the 1st and 2nd Respondents from subjecting the petitioner to disciplinary proceedings.
- (iii) **A declaratory Order** that it is only a duly constituted county public service board that can exercise disciplinary proceedings against the Petitioner.
- (iv) **A mandatory injunction** compelling the Respondents to allow the Petitioner to continue serving in his position of Chief Officer, Housing and Sanitation or any other department that is equivalent.
- (v) **A prohibitory Order** prohibiting the Respondents from advertising for the position of chief officer housing and sanitation.
- (vi) Costs of the Petition be borne by the Respondents.

The two Petitions were on 22nd December, 2015 consolidated under Petition No.33 of 2015 as the lead file. Both Petitions were filed together with motions under certificate seeking conservatory orders which were granted on 22nd December, 2016 barring the Respondents from advertising or otherwise filling the positions held by the petitioners.

On 16th February, 2016 the applications filed by the petitioners were by consent of the parties consolidated with the petition and parties agreed to proceed by way of written submissions, which were highlighted in court on 20th June, 2016.

2nd Petitioner's Case

He was employed as Chief Officer Tourism on 11th March, 2014. He was later transferred to the office of Chief Officer, Housing and Sanitation. The employment was for a fixed term contract of 5 years.

On 3rd September, 2015 the 1st Petitioner was suspended from service. The letter of suspension was signed by County Secretary & Head of Public Service Board. The grounds for her suspension are that he had not adequately responded to an audit query on specific allegations under section 155 of the Public Finance Management Act being;

1. Tree planting exercise in the 45 wards of the County at a cost of Kshs.6,400,000;
2. Miss Tourism Programme for Bungoma County at the cost of Kshs.3,900,000.00;
3. Mt. Elgon Route Mapping at the cost of Kshs.410,445.00 and;
4. Funds for the Tourism Regulatory Workshop of Kshs.128,000.00.

The letter of suspension further states that Mr. Fwamba was given an opportunity to respond to the charges against him but failed to do so.

By a letter dated 16th October, 2015 the Petitioner was invited to attend a special ADHOC Committee on 21st October, 2015 at 10.00 am at the office of the Director Human Resource Management "to provide some information." When he attended the meeting he was surprised to find that it was a disciplinary hearing. On 7th December, 2015 the 1st Petitioner learnt through the media that his contract had been terminated by the 1st Respondent.

Aggrieved by the foregoing, the 1st Petitioner filed Petition No. 32 in which he seeks the following reliefs;

- (i) **A Declaration Order** that the 1st and 2nd Respondent have no jurisdiction to submit the Petitioner into disciplinary procedure and dismiss him from employment be made.
- (ii) **An order of prohibition** prohibiting the 1st and 2nd Respondents from subjecting the petitioner to disciplinary proceedings.
- (iii) **A declaratory Order** that it is only a duly constituted county public service board that can exercise disciplinary proceedings against the Petitioner.
- (iv) **A mandatory injunction** compelling the Respondents to allow the Petitioner to continue serving in his position of Chief Officer, Housing and Sanitation or any other department that is equivalent.
- (v) **A prohibitory Order** prohibiting the Respondents from advertising for the position of chief officer housing and sanitation.
- (vi) Costs of the Petition be borne by the Respondents.

Petitioners Submissions

Relying on the affidavits in support of their motions, petitions and supplementary affidavits filed in response to the replying affidavits of the Respondents, the petitioners submit that the Respondents violated Articles 1(1) , 2, (4), 23(3), 41(2), 47, 50, 200(2)(c), 232, 235(1), 236 of the Constitution,

sections 45, 57, 59(1) (c), 76 and 77 of the County Government Act and Section 41 of the Employment Act.

It was submitted for the Petitioners that their suspension letters were issued by the County Secretary and Head of Public Service, the 2nd Respondent, on the directions of the 1st Respondent, the Governor contrary to section 59 of the County Government Act.

It is further submitted that the ADHOC Committee which called the petitioners for a disciplinary hearing on 2nd December 2015 was not properly constituted as the Public Service Board did not delegate its authority to discipline employees to the ADHOC Committee. It is further the petitioners case that the Respondents violated Article 234 and 236 of the constitution and therefore both the suspensions and the alleged termination of their contracts were null and void.

It is further the petitioners' case that they were not given a fair hearing as they were not given notice of the disciplinary hearing. It is their case that their hearing was not procedurally fair as it did not comply with section 41 of the Employment Act.

The Petitioners relied on the case of **Richard Bwogo Birir v Narok County Government & 2 others [2014]eKLR** and **Muguna Geoffrey v Attorney General Civil Case No.3472 of 1994**.

The 1 st and 2nd Respondent's Case

The 1st and 2nd Respondents filed a joint replying affidavit and Response to the Petition. They further filed written submissions and list of authorities.

It is their case that the 1st Respondent is mandated by section 30 of the County Governments Act to provide leadership in the governance of the County with attendant powers necessary for execution of the duties of the governor. That the 2nd Respondent is by virtue of section 44 of the County Governments Act the head of the County Public Service, that the 1st Respondent is the appointing authority of Chief Officers of the County subject only to the approval of the County assembly and may re-assign a chief officer.

The 1st and 2nd Respondents aver that the County Government of Bungoma carried out an internal audit as required by section 155 of the Act whose findings unearthed misappropriation of funds by the petitioners, and the petitioners were suspended from duty by letter dated 3rd September 2015, to pave way for investigations. It is their case that by letter dated 18th September, 2015 the 3rd Respondent delegated to the 2nd Respondent the responsibility to investigate the petitioners. Consequent to the delegation the 2nd and 3rd Respondents by virtue of section 86 of the County Governments Act formed a special ADHOC Committee to investigate the allegations against the petitioners. The committee was composed of the Deputy County Secretary, Director Human Resource, Chief Officer, Finance, county Attorney, Gender Advisor and County T. Co-ordinator, all of whom are in the employment of the County Government of Bungoma.

By letter dated 7th October, 2015 the Secretary to the AD-HOC Committee wrote to the petitioners asking them to respond to the allegations against them which both of them responded to. By letter dated 16th October, 2015 the petitioners were both invited to appear before the Ad-hoc Committee which they did on 21st October, 2015.

The Ad-Hoc Committee prepared its findings which were submitted to the 3rd Respondent on 2nd December, 2015. The Report recommended that the contracts of the petitioners be terminated on

grounds stated in the report.

It is the position of the 1st and 2nd Respondents that the 1st Respondent merely communicated the position of the County Public Service Board to terminate the contracts of the petitioners, as the 1st Respondent did not have powers to terminate the contracts of the petitioners.

It is the 1st and 2nd Respondent's position that the petitioners termination is lawful and that the petitions should be dismissed.

3rd Respondents Case

The 3rd Respondent filed a replying affidavit of Elizabeth Wanyonyi its Secretary and C.E.O and also filed written submissions.

It is the 3rd Respondent's case that the disciplinary process against the petitioners was undertaken fairly on legitimate and established grounds and they were accorded a hearing by the 3rd Respondent on 2nd December, 2015 but it is yet effect the termination of the petitioners. It is the 3rd Respondents case that in the circumstances the petitioners came to court prematurely.

In the written submissions the 3rd Respondent submits that there is no evidentiary value in third party articles in a newspaper, that having been employees of the 3rd Respondent the petitioners could only be terminated by the 3rd Respondent.

It is further the submission of the 3rd Respondent that even though it has powers to delegate under section 86(1) of the County Government Act, the 1st Respondent is not eligible for such delegation and any attempts by the 1st Respondent to terminate the contracts of any employee of the 3rd Respondent is ultra vires. In this respect the 3rd Respondent relied on the case of **Merita Akinyi Ombuor v County Government of Kisumu [2014]eKLR**.

It is the 3rd Respondent's position that being a corporate entity it is not liable for violations by the 1st and 2nd Respondents.

Finally the 3rd Respondent submits that the disciplinary process against the petitioners has not been concluded and that a roadside declaration cannot be the basis of a petition as was stated in **Centre of Human Rights & Democracy v Moi Teaching and Referral Hospital Board & 2 others [2012]eKLR**.

The 3rd Respondent further submitted that section 77 of the County Governments Act provides for appeals to the Public Service Commission and the Petitioners have therefore not exhausted the disciplinary process. They relied on the case of **Speaker of the National Assembly v The Hon. Jane Njenga Karume [2008] 1 KLR 426** in which the Court of Appeal stated that strict compliance with clear procedure which the constitution or statute provides in redressing any particular grievance is mandatory.

The 3rd Respondent submitted that the petitioners have failed to specify the manner in which it had violated their constitutional or statutory rights and that there is no cause of action against the 3rd Respondent and the 3rd Respondent should be discharged from the proceedings.

Determination

Having considered the pleadings, the evidence on record and the written and oral submissions of the parties , the issues that arise for determination are the following:-

1. Whether the disciplinary procedure was flawed.
2. Whether the Respondent's violated the constitutional rights of the Petitioners under Article 1(1) & 4, 2(1) & (2), 23(3), 41(2), 47, 50, 200, 260, 232, 235(1), 236, Section 57, 59(1)a, Section 41.
3. Whether the Petitioners employment contract have been terminated.
4. Whether the Petitioners are entitled to the remedies sought.

Whether the disciplinary process of the petitioners was flawed

There is no dispute that the petitioners were first directed to respond to audit queries by the 1st Respondent in his capacity as the officer accountable for the management and use of the county resources. From the correspondence on record, it appears that the 1st Respondent was not satisfied with the explanation of the Petitioners and therefore directed the 2nd Respondent to suspend the petitioners to give way for further investigation. The petitioners responded to the letters of suspension and their responses were addressed to the County Secretary.

Following their suspension an Ad-Hoc Committee was constituted to investigate the allegations against the petitioners. The petitioners were invited to make written representations to and further appeared before the Ad-Hoc Committee which later submitted its report to the 3rd Respondent.

The 3rd Respondent invited the petitioners to appear before it on 2nd December, 2015.

It is my finding that the 1st Respondent had authority to require the petitioners to respond to audit queries by virtue of his responsibilities and powers under sections 30 and 31 of the County Public Service Act. He also had power to order investigations by the 3rd Respondent following the unsatisfactory responses received from the petitioners.

I also find that the Ad-Hoc Committee was properly established by the 3rd Respondent under its power to delegate donated by section 86 of the County Government Act. I further find that the petitioners were given a reasonable opportunity to defend themselves first through the letter of the 1st Respondent dated 22nd July, 2015, then by the letters in response to the suspension letters. Thereafter they appeared before the Ad-Hoc Committee and lastly they appeared before the 3rd Respondent on 2nd December, 2015.

The Petitioners having been chief officers are covered by section 41 of the Employment Act. The petitioners however did not produce for the court their contracts of service to enable the court confirm if there is provision for a specific disciplinary process. They are all the same entitled to fair labour practice including rules of natural justice. As was stated in the case of **J.W.N. v Teachers Service Commission [2014]eKLR** "It is important to note that what the law requires is not a perfect hearing but fair hearing."

The petitioners' have not pinpointed any prescribed disciplinary procedure which the Respondents failed to comply with. I am satisfied that under the circumstances of this case the petitioners were accorded a fair hearing taking into account that the disciplinary procedure had not been concluded. I however must point out that at the time they came to court they had not been subjected to a hearing anticipated under section 41 of the Employment Act and perhaps as stated by the 3rd Respondents, they came to court pre-maturely. It is however appreciated that they had real apprehension that their employment may be terminated without being subjected to the said hearing going by the hurried manner in which they were summoned and subjected to the hearing of 2nd December, 2015.

Whether the Petitioners are Entitled to the Prayers Sought

The petitioners alleged that their rights under Articles 1, 2, 23, 41, 47, 50, 200, 232, 235 and 236 have been breached by the Respondents.

In the case of **Anarita Kirimi** the court stated that a person claiming that a constitutional right has been violated must apart from citing the relevant sections alleged to have been violated with reasonable precision, the petitioner must also state by whom and demonstrate the manner in which the violation occurred as a minimum requirement.

While in the Case of **Daniel Chacha Muiruri** the court stated that "It is the petitioner's duty to specify and demonstrate with particularity the constitutional rights which have been violated, in what manner and by whom.

It was submitted for the petitioners that under Article 1 the Constitution is binding on all persons including the Respondents and that under Article 2 any act in contravention of the constitution is invalid. It is further submitted for the petitioners that Article 3 obliges every person to respect, uphold and defend the constitution and under article 10 the Respondents are bound by the provisions on national values. It is the Petitioners contention that the Respondents acted in breach of Article 232 and 235 by wrongly constituting the Ad-Hoc committee.

As I have already held herein above the Ad-Hoc Committee was not wrongly constituted. I have also already found herein above that the petitioners were accorded a fair hearing as far as the disciplinary process had progressed by the time they came to court, thus negating their contention of breach of Article 47 on fair administrative action, taking into account the fact that the disciplinary process had not been concluded by the time they came to court.

I do not think Article 50 which the petitioners aver was breached by the Respondents is applicable as the same presupposes a hearing before a court or tribunal. The disciplinary proceedings they were subjected to do not fit into the hearing anticipated in Article 50 as it was not a hearing before a court or tribunal.

The petitioners have not proved violation of any of their rights that have been complained of under the various provisions of the constitution.

The Petitioners prayed for a declaration that the 1st and 2nd Respondents have no jurisdiction to submit the petitioners into disciplinary procedure and dismiss them from employment, an order prohibiting the 1st and 2nd Respondents from subjecting them to disciplinary proceedings and a declaration that only a duly constituted County Public Service Board can exercise disciplinary proceedings against them.

The basis for these prayers are the allegations by the petitioners that they were terminated through publications in the print media by the 1st Respondent.

The Petitioners have not submitted any proof other than the newspaper cuttings that the 1st Respondent actually issued a press release or made an announcement as published in the newspapers. No press release was produced and no reporter's affidavit has been annexed. In the case of **Wamwere v The Attorney General [2004] 1 KLR** the court observed that media articles have no probative value and the courts cannot rely on them as a basis for determination of a case. The same observation was made in **Randu Nzau Ruwa & 2 others v Internal security Minister & another [2012]eKLR**.

In the case of **Tesco Corporation Ltd v Bank of Baroda (K) Limited** the court stated as follows:-

"The real question for consideration and decision by this court is as to whether on the evidence it has been satisfactorily established that the plaintiff did part with the possession of the premises or any part thereof to any one in a manner to constitute a breach of contract. The only evidence relied upon by the applicant is a newspaper report contained in the Daily Nation of 19th November, 2007. The issue here is admissibility of documentary evidence as to the facts in issues.

The provisions of Section 35 of the Evidence Act are clear on this issue....

Having considered the application in light of the affidavit evidence and submissions by both counsel and the relevant law, I am not persuaded that the newspaper report is covered under the provisions of Section 35 of the Evidence Act."

Having stated the foregoing, was there any termination of the petitioners contracts of the petitioners"

The 3rd Respondent whom the petitioners have acknowledged is the only duly constituted body with authority to discipline them has declared that they have not been dismissed and alleges that they came to court prematurely. The 1st and 2nd Respondents on the other hand have stated that a decision had been made, not by the 1st or 2nd Respondents, but by the 3rd Respondent, to terminate the contracts of the petitioners, but they came to court before the letters of termination were prepared and served upon them. What the foregoing portends is that the petitioners' contracts have not been terminated by either the 1st Respondent or the 3rd Respondent as has been confirmed by the Respondents. The remedies they seek in respect of the termination must therefore fail.

The Petitioners further prayed for a mandatory injunction compelling the Respondents to allow them to continue serving as Chief Officer, Housing and Sanitation, and Chief Officer, Gender and Culture respectively. They further prayed for orders prohibiting the Respondents from advertising their positions.

Since they have not been terminated, these prayers are redundant as they are still the substantive holders of those positions. There was no evidence adduced of intention to advertise the positions while the petitioners are still in office. These prayers are therefore redundant.

The court must however observe that discipline is a prerogative of an employer and the court will be reluctant to enter into the Boardroom to micromanage the affairs of employers. The court will only intervene where there is demonstrated failure to comply with the internal or statutory disciplinary procedures and even then only to set the situation right. The court also takes judicial notice of Chapter 6 of the constitution especially article 73 (2) on the principles of leadership and integrity. The court notes that the report of the 3rd Respondent on the suspension of the petitioners had recommended that Criminal Investigations Department and the Ethics and Anti-corruption Commission investigate the petitioners. The court will not interfere with such proceedings, or the suspension of the petitioners provided the same is done within the confines of the law.

For the foregoing reasons it is my finding that the petitioners have not proved that the Respondents have violated their constitutional rights set out in the petition. The upshot is that the petition is dismissed. There shall be no orders for costs.

Dated and signed and delivered this 15th day of September, 2016

MAUREEN ONYANGO

JUDGE



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