



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CONSTITUTIONAL PETITION NO. 4 OF 2015

GEOFFREY MWORIA..... PETITIONER

-VERSUS-

WATER RESOURCES MANAGEMENT AUTHORITY.....1ST RESPONDENT

JAMES AMBUSO.....2ND RESPONDENT

PHILIP J. OLUM.....3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th July, 2016)

JUDGMENT

The petitioner filed a petition on 28.04.2015 through Magee Wa Magee & Company Advocates. The petition alleged violation of the petitioner's fundamental rights and freedoms under Articles 29(d), 41(1), 41 (2) (b), 47 (1) and 47 (2) of the Constitution of Kenya, 2010. The petition also invoked Articles 20(1), 22(1), 23(1), 162(2) (a), 162(3) and Article 165(3) (b) of the Constitution. The petitioner prayed for:

- a) A declaration that the respondents have violated the petitioner's right to freedom and security of the person as provided for under Article 29(d) of the Constitution of Kenya.
- b) A declaration that the respondents have violated the petitioner's right to fair labour practices as provided for under Articles 41(1) and 41(2) (b) of the Constitution of Kenya.
- c) A declaration that the respondents have violated the petitioner's right to fair administrative action as provided for under Article 47(1) and (2) of the Constitution of Kenya.
- d) An order for the Ethics and Anti-corruption Commission to investigate corruption offences committed in the 1st respondent by the 2nd and 3rd respondent and other employees and prosecute them as by law provided.
- e) General damages for violation of the petitioner's constitutional rights.
- f) Costs of the suit.

The petitioner filed the petition together with his supporting affidavit sworn on 28.04.2015 and the attached exhibits.

The 2nd respondent James Ambuso filed his replying affidavit on 12.06.2015. For the 1st and 3rd

respondents, the 3rd respondent filed his replying affidavit on 12.06.2015. The respondents appointed Prof. Albert Mumma & Company Advocates to act for them throughout the proceedings.

On 18.06.2015 the petitioner filed a list and copies of documents together with his further supporting affidavit.

The parties relied on the pleadings, affidavits, exhibits, witness statements and the oral evidence taken at the hearing. The parties filed their respective written submissions and which they highlighted orally.

The facts relating to the petitioner's service record are largely not in dispute. The petitioner is a career public official initially serving in the civil service and later absorbed in the service of the 1st respondent, a statutory body and therefore an employer in the public service. Before the current dispute the petitioner was deployed at the 1st respondent's Nanyuki office. The petitioner has about 5 years of service to go before attaining the mandatory retirement age of 60 years.

The petitioner's case is that he received on 31.03.2015 a letter of transfer dated 12.03.2015 requiring him to report on transfer at Kakamega by 12.04.2015. It was the petitioner's further case that at the time of the transfer letter he had been required to record some statement at the Ethics and Anti-Corruption Commission (EACC) in an investigation involving alleged corruption against the 2nd respondent. In particular, the petitioner has set out the instances of issues of alleged want of integrity against the 2nd respondent in the letter dated 26.03.2015 addressed to the Cabinet Secretary for Environment, Water and Natural Resources.

The allegations by the petitioner against the respondents range from alleged unfair petitioner's transfer from Loitokok to allegedly prevent the petitioner from travelling to Japan on a project he was working on; alleged unfair demands for money the petitioner says he send to the 2nd respondent throughout 2012 and in failing to meet increasing demands the 2nd respondent allegedly threatened to sack the petitioner; in December 2012 the 2nd respondent allegedly demanded that the petitioner cuts his annual leave to go and induct an officer junior to the petitioner; on 1.03.2013 the 2nd respondent allegedly demanded that the claimant writes to recommend an unqualified person to be employed as a driver; in June 2013 the 2nd respondent allegedly unfairly accused the petitioner for being behind certain negative publicity in the print media and the petitioner faced some disciplinary process; an appeal against the unfair decision in that disciplinary case has been problematic to determine despite intervention by the Commission on Administrative Justice and due to the alleged influence by 2nd respondent; on 30.10.2014 the 2nd respondent is said to have sneaked into the petitioner's Nanyuki office and pretending to be friendly - the petitioner says he attempted to coach him on what to tell the EACC and upon the claimant's refusal to the coaching, the 2nd respondent allegedly became incensed and he told the petitioner if he sinks he will sink with the petitioner and thereafter the petitioner received a letter to record a statement with EACC; and the petitioner made a report to the police about the threats. The petitioner further states that while deployed at the Mombasa office, the 2nd respondent instructed him to pay to the 2nd respondent 10% of all the 1st respondent's funds provided for the operations of the Mombasa office and that issue is one of the core issues under the investigation by the EACC.

The petitioner is apprehensive that his transfer to Kakamega is not normal as it is a trap which may lead to his death, and he feels insecure that his life is in danger in view of the 2nd respondent's alleged interference in the investigations by the EACC. The petitioner says that the 2nd respondent is extremely powerful in the 1st respondent's organisation and is keen to ruin the petitioner's employment and life.

The petitioner's other fear is that the 2nd respondent's ancestral home is about 50Km from Kakamega which exposes the petitioner to enhanced sense of insecurity in view of the ongoing threats and the EACC investigation. The claimant's prayer is that the transfer to Kakamega should be held in abeyance until the inquiry by the EACC is completed and his appeal in previous disciplinary case is heard and determined by the 1st respondent's board.

The petitioner's further case is that the 3rd respondent unfairly instituted and continued the disciplinary case against the petitioner currently subject of the pending appeal which is yet to be resolved by the 1st respondent's board. The petitioner is afraid that the 2nd and 3rd respondents have acted unfairly to transfer him to Kakamega. He was further afraid that by the letter dated 9.04.2015 by the 3rd respondent, he was required to immediately report to Kakamega in circumstances whereby his concerns against the transfer as set out in the letter to the Cabinet Secretary of 26.03.2015 had not been addressed or resolved.

Against that background the petitioner has pleaded as follows:

- a) The letter dated 12.03.2015 Ref. No.00151 transferring the petitioner to Kakamega by or before 12.04.2015 and the letter dated 09.04.2015 ref. No. P/NO.00151/ (52) (referring to the petitioner's letter dated 26.03.2015 seeking intervention by the Cabinet Secretary and requiring the petitioner to comply with the instructions to go on transfer without delay) amounted to unfair administrative action that put the petitioner's life to danger thereby contravening the petitioner's right to fair administrative action as provided in Article 47(1) and (2) of the Constitution.
- b) The acts of the respondents to frequently transfer the petitioner from station to station is a violation of the petitioner's right to reasonable working conditions contrary to the provisions of Article 41(1) and (2) (b) of the Constitution and other international treaties.
- c) The acts by the respondents to subject the petitioner to unreasonable and unlawful disciplinary procedures based on unfounded facts, coupled with verbal threats and intimidation is a violation of the petitioner's right to fair labour practices contrary to Article 41(1) and (2) (b) of the Constitution and further a violation of the petitioner's right not to be subjected to psychological torture contrary to Article 29(d) of the Constitution.
- d) The respondent's failure to decide the petitioner's appeal and deal with his complaints, as well as failure to give reasons for the decisions taken, amounted to violation of the petitioner's right to fair administrative action contrary to Article 47(1) of the Constitution.

The respondents' case against the petition is as follows:

- a) The petitioner is a hydrologist and one of the very few experts in surface water employed by the respondent so that his deployment to Kakamega and related region was justified as the transfer was within the 1st respondent's day to day operations.
- b) Allegations made by the petitioner against the respondents are calculated to show the court that there was need to stop the transfer but the allegations were not true.
- c) The respondents could not establish the action taken on the petitioner's appeal but the 3rd respondent's evidence was that action had been taken.
- d) Five (5) years was the upper limit for the staff to stay in a station of deployment. The 1st respondent had instituted a staff matters committee which deliberated all transfers and it was for the Head of Department to propose a transfer and not the 3rd respondent in the capacity of the chief executive officer.
- e) The 3rd respondent's evidence was that minutes must exist on every transfer but such minutes had not been filed and they were in the custody of the human resources department of the 1st respondent. The 3rd respondent admitted that his affidavit or the transfer letter had not set out the reason for the transfer.
- f) The 3rd respondent's case was that his travel was organized and paid for by the respondent's head office and he denied that the petitioner had paid for the accommodation for the 3rd respondent and

his spouse as the petitioner had alleged.

g) The 3rd respondent stated that the petitioner could have been forced to employ a driver without the 3rd respondent's involvement because the 3rd respondent would not be directly involved in recruitment of a driver. The 3rd respondent further stated that the board had delegated to him the powers to employ all staff in lower grades such as drivers.

h) The 3rd respondent testified that he had seen in court (and before court proceedings he had not seen and had knowledge of) the petitioner's letter to the Cabinet Secretary dated 26.03.2015 and also the letter dated 9.04.2015 signed on behalf of the 3rd respondent asking the petitioner to report to Kakamega immediately.

i) The 2nd respondent is at all material times the Finance and Administration Manager for the 1st respondent. He confirmed the schedule of money sent to the respondent's Mombasa office and filed by the petitioner to have been correct. From 28.09.2012 to 16.01.2013 no money was dispatched to Mombasa but the 2nd respondent did not know the reason why the money was not dispatched. He denied ever demanding 10% from the money the 1st respondent dispatched to the Mombasa office on a monthly basis.

j) The 2nd respondent denied that he instructed the petitioner to pay hotel accommodation bills for the 1st respondent's staff visiting Mombasa and the 2nd respondent testified that he was not aware that the Ethics and Anti-corruption Commission was investigating that issue. He also denied that he did not tell the petitioner that the petitioner would never travel out of Kenya allegedly because he had failed to give to 2nd respondent the 10% out of the Mombasa 1st respondent's funds; the allegations in that regard by the petitioner were not true.

k) The 2nd respondent denied that he went to the petitioner's office at Nanyuki to intimidate the petitioner about the information the petitioner was to give to the Ethics and Anti-corruption Commission. The 2nd respondent denied telling the petitioner that the 2nd respondent would harass the petitioner for the petitioner's refusal to participate in the alleged corruption.

The court has carefully considered the material on record and makes findings as follows:

First, the petitioner reported to the police the alleged intimidation and harassment by the 2nd respondent. The report has not been fully investigated and its destiny, being a criminal process, is yet to be determined through the due criminal justice process. The court was not shown the steps taken by the police towards prosecution of the 2nd respondent or any other person in view of the report the petitioner says he had made against the 2nd respondent. The court further considers that the alleged corrupt practices at the 1st respondent's operations and more particularly as alleged by the petitioner and for which the petitioner has recorded a statement are still subject to the on-going investigation by the Ethics and Anti-corruption Commission. The court considers that the investigations by the police and the Commission in the cited matters would require evidential proof of beyond reasonable doubt applied in the criminal justice proceedings.

Taking into account the material before the court and in view of the on-going investigations and in absence of findings by the criminal trial court on those matters, the court returns that it would be premature to make a declaration of the violation of the petitioner's rights based on the criminal culpability of the respondents (but which has not been so established by the relevant trial court in a criminal proceeding commenced for that purpose). Thus, the prayer for a declaration that the respondents have violated the petitioner's right to freedom and security of the person as provided for under Article 29(d) of the Constitution of Kenya will fail. While making that finding, the court follows the opinion in **Silas Make Otuke- Vesus- Attorney General and 3 Others [2014]eKLR** that the present petition as far as the claims and prayers relate to pending criminal investigations, the petition was premature as it ought to

have been brought after the criminal process was exhausted and the findings of guilt or otherwise of the 2nd and 3rd respondents made by relevant criminal court.

Second, the court has considered the evidence on record. The court returns that the petitioner has failed to show that the transfer to Kakamega would visit upon him a serious threat to the petitioner's life as was alleged. The petitioner failed to show that the rural home for the 2nd and 3rd respondents was near or around Kakamega and even if that fact was established, the petitioner did not establish how that on its own would constitute a threat to the petitioner's life. Thus the court returns that the letter dated 12.03.2015 Ref. No.00151 transferring the petitioner to Kakamega by or before 12.04.2015 and the letter dated 09.04.2015 ref. No. P/NO.00151/ (52) (referring to the petitioner's letter dated 26.03.2015 seeking intervention by the Cabinet Secretary and requiring the petitioner to comply with the instructions to go on transfer without delay) did not amount to unfair administrative action that put the petitioner's life to danger thereby contravening the petitioner's right to fair administrative action as provided in Article 47(1) and (2) of the Constitution. The associated prayer will therefore fail.

Third, the 3rd respondent being the 1st respondent's chief executive officer confirmed that transfers were handled by the staff matters committee and in the ensuing and questionable petitioner's transfer by the letter dated 12.03.2015 Ref. No.00151 transferring the petitioner to Kakamega by or before 12.04.2015 and the further letter dated 09.04.2015 ref. No. P/NO.00151/ (52), the 3rd respondent confirmed that there were no relevant minutes. The 3rd respondent also confirmed that as the chief executive officer for the 3rd respondent he was not aware of the letter dated 09.04.2015 ref. No. P/NO.00151/ (52) requiring the petitioner to report at Kakamega immediately. In the circumstances the court finds that the staff matters committee and the 3rd respondent as the chief executive officer were not involved and were not aware of the petitioner's transfer and the transfer decision was suspect as it amounted to an unfair labour practice in contravention of the petitioner's right to fair labour practices as protected under Article 41(1) of the Constitution. The court holds that it is unfair labor practice for the employer to impose a decision against the employee made in breach of the agreed or lawful or reasonable conventional procedure and the relevant person or authority to be involved in making the decision on the part of the employer.

The 3rd respondent further confirmed that the 1st respondent's policy was that the employees serve in one station for a maximum of five years. However, the court finds that the respondents subjected the petitioner to suspect transfers whereby the criteria and procedure applicable was not defined or agreed between the parties. Such transfers that were based upon unprocedural and undefined criteria, in the opinion of the court, amounted to unreasonable working conditions in contravention of the petitioner's rights under Article 41(2) (b) of the Constitution.

Accordingly the court returns that the petitioner is entitled to the declaration that the transfers as imposed by the 1st respondent against the petitioner were in contravention of the petitioner's right to fair labour practices under Article 41(1) of the Constitution for breach of the agreed or lawful or the reasonable conventional procedure on making transfer decisions involving the 1st respondent's staff matters committee; and contravention of the petitioner's right to reasonable working conditions under Article 41(2) (b) of the Constitution for want of defined procedure and criteria for making transfer decisions as agreed between the parties or lawfully instituted by the 1st respondent. In this case, the court returns that the petitioner shall be entitled to continue serving in his present station of deployment until the 1st respondent, being not later than 31.12.2016, lawfully institutes and publishes a defined procedure and criteria for making transfer decisions for all its employees.

Fourth, the petitioner prayed for an order for the Ethics and Anti-corruption Commission to investigate corruption offences committed in the 1st respondent by the 2nd and 3rd respondent and other employees and prosecute them as by law provided. The evidence by all the parties is that such investigations are ongoing and the court returns that such an order as prayed for would be superfluous as it would add no value or serve further and better purpose. The prayer will therefore be declined.

Fifth, the petitioner prayed that respondent's failure to decide the petitioner's appeal and to deal with the

petitioner's complaints, as well as failure to give reasons for the decisions taken, amounted to violation of the petitioner's right to fair administrative action contrary to Article 47(1) of the Constitution. It was the undisputed duty and authority of the 1st respondent to decide the appeal as was requested by the petitioner. No explanation has been given why the appeal was not decided. Nevertheless the court considers that the respondents made no decision on the appeal or the complaints so that there was no decision in terms of and as envisaged in Article 47(1) of the Constitution to be subject of the prayer as was made. Even if it was to be considered that the failure or refusal to decide the appeal or resolve the complaints was a negative decision amenable to Article 47 (1), the court finds that such was not the submission made for the petitioner and the court's view is that the proper remedy for refusal to exercise a duty would be the judicial review order of mandamus or a mandatory injunction as would be deemed appropriate. Thus the court returns that the petitioner is not entitled as prayed for.

Sixth, the petitioner prayed for damages for the violation of his fundamental rights. The court considers that the petitioner has continued in employment throughout the pendency of the petition with full benefits including due monthly pay and the petitioner has not justified the award of general damages. The submissions as made for the petitioner did not provide for a coherent assessment of damages and in the circumstances of the case, the declaration as already found just will sufficiently serve the ends of justice without the need to award damages as prayed for.

As the petitioner has substantially succeeded in his case and largely against the 1st respondent, the 1st respondent will pay the costs of the petition and all respondents will bear their own respective costs of the petition.

In conclusion, judgment is hereby entered for the petitioner against the respondents for:

- 1) The declaration that the transfers in issue as imposed by the 1st respondent against the petitioner were in contravention of the petitioner's right to fair labour practices under Article 41(1) of the Constitution for breach of the agreed or lawful or conventional procedure on making transfer decisions involving the 1st respondent's staff matters committee; and the transfers contravened the petitioner's right to reasonable working conditions under Article 41(2) (b) of the Constitution for want of defined procedure and criteria for making transfer decisions as agreed between the parties or lawfully instituted by the 1st respondent.
- 2) For avoidance of doubt the transfer of the petitioner to Kakamega is hereby set aside and the petitioner shall be entitled to continue serving in his present station of deployment at Nanyuki until the 1st respondent, not later than 31.12.2016, lawfully institutes and publishes a defined procedure and criteria for making transfer decisions for all its employees.
- 3) The 1st respondent to pay the petitioner's costs of the petition and all respondents to bear their own respective costs of the petition.

Signed, dated and delivered in court at Nyeri this **Friday, 29th July, 2016.**

BYRAM ONGAYA

JUDGE