



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAKURU

PETITION NO. E4 OF 2020

IN THE MATTER OF CONTRAVENTION OF ARTICLES 10, 19 (2), 20 (2), 21 (1), 22, 23, 27, 41, 47, 50 (1), 159, 162 AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 41 & 47 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

WALTER KIPLANGAT SEREM.....PETITIONER

VERSUS

TURKANA UNIVERSITY COLLEGE COUNCIL....RESPONDENT

RULING

BACKGROUND:

1. The application before court is the one dated 8th day of November 2020 filed by the petitioner herein through a Notice of Motion application brought under Article 22, 23, 41 and 159 of the Constitution of Kenya, 2010, section 49 (3), (4) and Section 12 (3) of the Employment Act, 2007, Section 1A, 1B and 3A of the Civil Procedure Act, Order 51 Rule 4 of the Civil Procedure Rules and other enabling provisions of the law. The applicant seeks orders as follows:

- 1. THAT the Application be certified urgent and heard ex-parte.**
- 2. THAT pending inter-parties hearing of this Application, a Conservatory Order be and is hereby issued staying the entire disciplinary process communicated by the respondent vide the letters dated 4th October, 2020.**
- 3. THAT pending inter parties hearing of the Application, the respondent be and is hereby ordered to reinstate the petitioner back to work and vacate the letter dated 10th February, 2020 sending the Petitioner on an indefinite compulsory leave.**
- 4. THAT pending the hearing and determination of the Petition, the Respondent be and is hereby directed to unconditionally lift the indefinite compulsory leave against the Petitioner and reinstate the Petitioner to work without loss of status, benefit or rank**
- 5. THAT the cost of this Application be provided.**

2. The Application is premised on the grounds that:-

1. VIDE a letter of appointment dated 17th January, 2018, the petitioner was appointed as an accountant scale XI for a contract period of 3 years.
2. THE petitioner executed his roles, responsibilities and duties diligently and faithfully in accordance with the contract of employment, the University Statutes, Human Resource Manual and the Universities Act No. 42 of 2012.

3. UNFORTUNATELY, vide a letter dated 10th February, 2020 the respondent met and in in its Special Full Council meeting, passed a resolution in the absence of the Petitioner, to unilaterally, illegally put the petitioner on an indefinite compulsory leave effective immediate.

4. THE petitioner has since been on the indefinite compulsory leave since 10th February, 2020 to-date against section D of the Turkana University College Human Resource Manual and Section 63 of the Universities Act No. 42 of 2012.

5. THE Human Resource Manual of the Turkana University College under Section D 5.2 2 (c), dictates that any such process ought to be concluded within six months in the absence of which, the affected member of staff has a right to be reinstated unconditionally.

6. THE Universities Act No. 42 of 2012 under Section 63 enjoins the respondent to provide procedural and substantial fairness to employees when conducting any disciplinary action and ensure the process is completed within 6 months.

7. THE respondent sent a Notice to Show cause dated 4th October, 2020 to the petitioner which was well out of the provisions of the Human Resource Manual of Turkana University College.

8. THE petitioner responded via his letter dated 15th October, 2020 and categorically sought clarification from the respondent's representative and further responded to the allegations raised in the Show Cause.

9. IN contravention of the Section D of the Human Resource Manual, Articles 41 and 47 of the Constitution of Kenya 2010 and Section 63 of the Universities Act 2012 the respondent through its representative proceeded to invite the petitioner for a disciplinary hearing on 3rd November, 2020;

10. PER his letter dated 30th October, 2020 the petitioner wrote to the respondent's representative and sought to have the planned disciplinary hearing of 3rd November, 2020 vacated in light of medical/health issues he had and further requested to be furnished with crucial

11. IN totality the decision to place the petitioner on an indefinite compulsory leave since 10th February, 2020 and the purported planned decision to conduct a disciplinary hearing outside the ambit of the provisions of the law is unlawful and violates the petitioner's rights to fair labour practices.

12. THE indefinite compulsory leave is not a fair disciplinary process contemplated by Section 43 and 45 of the Employment Act, Section D of Turkana University College Human Resource Manual, section 63 of the Universities Act 2012 and that the action by the respondent was therefore unprocedural, unfair, unlawful, null and void ab initio contravening the petitioner's right to fair labour practices contrary to Articles 41(1) & (2) (a), and 47 (1) and (2) of the Constitution of Kenya.

13. THERE is real and imminent danger that unless this Honourable Court immediately intervenes, issues an order directing the Respondent to reinstate the Petitioner back to work and declares the intended disciplinary illegal the petitioner will suffer prejudice.

14. THE decision of the respondent was substantively unfair and a breach of the petitioner's right to fair administrative action under Article 47 of the Constitution of Kenya 2010.

15. THE court has supervisory jurisdiction over the actions of the respondent and to grant the prayers sought in order to safeguard proper exercise of statutory powers within the parameters of the law to prevent abuse of power.

16. THE Honourable Court ought to intervene as a matter of urgency in order to avoid the law of the jungle from taking precedent at Turkana University College.

3. The application is further supported by the applicant's supporting affidavit in which he reiterates the averments in the grounds in support but also annexed the evidence in support thereof.

4. At the interlocutory stage, this court certified the application urgent and also gave conservatory orders staying the entire disciplinary process communicated by the respondent via the letter dated 4th October, 2020.

5. On 16th November, 2020 the respondents filed their replying affidavit to this affidavit. The application was sworn by Professor George N. Cheminigwa the respondent's Ag Principal and Secretary to the committee and chairperson of the management board of the respondent.

6. The respondents averred that the orders the applicant sought are not fit to be granted as they are not linked to such private party issues as the prospects of irreparable loss occurring during the pendency of a case are not available.

7. The respondents aver that conservatory orders are granted based on inherent power of a case which is lacking in the petitioner's case. The respondents aver that they exercised their inherent powers properly to place the applicant on compulsory leave pursuant to powers granted to it by law.

8. They further aver that the respondent's committee members term came to an end and therefore they couldn't conduct any disciplinary processes due to lack of a full council in place.

9. The respondents also aver that the period prescribed of conducting a disciplinary process within 6 months cannot be read in isolation to Section 36 which provides for the appointment and constitution of a council for a university.
10. The respondents aver that the 6 months cannot run when there is no duly constituted council of a university.
11. The respondents further aver that the respondents efforts to deal with the disciplinary hearing was hampered by the COVID-19 pandemic health control regulations which the court is limited to take Judicial notice of.
12. The respondent avers that the petition and the motion are incompetent in that the petitioner is also guilty of non-disclosure having failed to inform court that he had instituted Eldoret ELRC No. 19/2020 **Walter Kiplagat Serem VS Turkana University College & another** which he only withdrew when he obtained interim orders herein.
13. I have examined the averment of the parties herein. The main issue of contention by the petitioner applicant is that he is being subjected to an unlawful and flawed disciplinary process.
14. In the circumstances of this case the only issue for this court's determination is whether indeed the process is flawed and whether the same can be discarded by order of this court.
15. From the averments of the applicants herein, the applicant has been on compulsory leave since 10th February, 2020 to date. This position is not denied by the respondents though. Vide the letter of 10th February, 2020 the applicant was directed to proceed on compulsory leave to pave way for investigations over allegations of possible action of corruption and abuse of office at the respondent's institution. Other acts complained of included gross insubordination, conflict of interest, financial impropriety or misappropriation of public resources and flouting of procurement procedures.
16. The applicant was directed to proceed on compulsory leave until investigations were complete or until otherwise directed.
17. The applicant remained on compulsory leave since February to 4th October, 2020 when he was now served with a Notice to Show Cause why disciplinary action should not be taken against him.
18. It is the applicants contention that he was placed on an illegal compulsory leave contrary to the respondent's HR Manual. Indeed Paragraph D 5. 2 2(c) of the respondent's HR Manual state that disciplinary action should be concluded within 6 months and where it is found impracticable to do so, the Principal shall report individual cases to the University Council explaining the reason for the delay.
19. In the case of the applicant there is no indication that any such explanation was given.
20. The respondents have attributed the delay to COVID-19 regulation and failure to have a University Council in place.
21. This notwithstanding, the applicant has averred that the university council was established thereafter but it still did not proceed to conclude the disciplinary process. There is no explanation for this omission. Other than the period within which the disciplinary process was to be concluded, there are other processes which were necessary before a disciplinary process could be enforced. This includes investigation being conducted as per clause D 5. 3 of the respondent's HR Manual. There is no indication that investigations have been done since February, 2020.
22. No investigation report has even been submitted.
23. In this court's view then the entire disciplinary process is flawed and therefore prejudicial to the applicant.
24. This court is alive to the fact that an employer has a right to institute disciplinary process. This court is however clothed with power to intervene and ensure that a fair disciplinary process is adhered to.
25. In **Anne Wambui Kamuiru VS Kenya Airways Ltd (2010) eKLR** this court made a finding as follows;
- “32 There is a convergence in agreement that an employer who commences disciplinary proceedings must ensure due process, fair hearing and due regard to natural justice. The courts on their part will not interfere with proper internal disciplinary processes unless the court is satisfied that the process is clothed with irregularities on or is stage managed towards dismissal”.**
26. Having stated as above and having found the process in place flawed, I find that indeed this court can and must interfere with a flawed disciplinary process in order to have it put on the right track.
27. It is therefore my finding that the application has merit. I therefore find for the applicant and order his immediate reinstatement to work and vacate the letter dated 10th February 2020 and all other subsequent letters of Notice to Show Cause to the applicant and even the invitation to a disciplinary hearing. Since these were the orders sought for in this application, the same will be in force pending the hearing and determination of the petition.
28. The respondent is however free to institute fresh, free and fair disciplinary processes against the applicant but must follow all the laid out processes as per the law and the respondent's HR manual.

29. Costs in the petition.

DATED and DELIVERED in open court this 10th day of December, 2020.

Hon Lady Justice Hellen Wasilwa

Judge

In the presence of:-

Matunda for petitioner