

274

REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT  
OF KENYA AT NAIROBI  
PETITION NO. E213 OF 2023

ENG. ANTHONY TAWAYI WAMUKOTA..... PETITIONER

- VERSUS -

THE KENYA ELECTRICITY TRANSMISSION

COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT

THE ACCOUNTING OFFICER/CHIEF EXECUTIVE

OFFICER OF KENYA ELECTRICITY TRANSMISSION

COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT

ETHICS AND ANTI-CORRUPTION

COMMISSION.....3<sup>RD</sup> RESPONDENT

*(Before Hon. Justice Byram Ongaya on Monday 08<sup>th</sup> April, 2024.)*

JUDGMENT

1. The petitioner filed the petition dated 05.07.2023 through Sikuta &

Associates Advocates seeking the following prayers:

- a) A declaration that the suspension of the petitioner was irregular, unprocedural, illegal, unconstitutional hence null

and void *ab initio*.

- b) An order directing the 1<sup>st</sup> respondent to unconditionally revoke the suspension of the petitioner from employment and order for his immediate reinstatement.
- c) An order directing the 1<sup>st</sup> respondent to pay the petitioner any pending salaries, allowances and benefits accrued to him while on suspension.
- d) An order revoking the letter dated 15<sup>th</sup> November 2023 suspending the petitioner herein.
- e) An order revoking the decision of the 2<sup>nd</sup> respondent contained in the letter dated 15<sup>th</sup> November 2023 directing the Board of the 1<sup>st</sup> respondent to suspend the petitioner herein.
- f) An order revoking the decision of the 1<sup>st</sup> respondent contained in the letter dated 15<sup>th</sup> November 2023 suspending the petitioner herein
- g) An order for the 1<sup>st</sup> respondent to pay the petitioner damages for failure to accord the petitioner procedural fairness in the process leading to his suspension.

h) An order restraining the respondents either by themselves, employees, servants or agents from terminating the employment of the petitioner based on the illegal suspension.

i) Costs of this petition be borne by the respondents.

2. The petition was based upon the petitioner's supporting affidavit and exhibits thereto filed together with the petition and sworn on 16.11.2023. The petitioner's case is as follows:

a) That he is the 1<sup>st</sup> respondent's General Manager, Design & Construction. He exhibited a copy of his employment contract.

b) That the Board of Directors of the 1<sup>st</sup> respondent on 15.11.2023 made a decision during its Special General Meeting under directions of the 3<sup>rd</sup> respondent to suspend the petitioner with immediate effect contrary to the provisions of the HR policy and procedures manual of the 1<sup>st</sup> respondent.

c) That the 1<sup>st</sup> respondent never acted on any complaint or allegations and that the 3<sup>rd</sup> respondent usurped the powers of the 1<sup>st</sup> respondent and consequently the suspension is illegal, unreasonable, irregular and procedurally unfair, without

foundation or basis.

- d) That the suspension happened in connection with the Ketraco-Loiyangalani-Suswa Transmission Interconnection (II) line Project despite there being a petition in the High Court Constitutional and Human Rights Division - Constitutional Petition No. E111 of 2023- in which the Honourable Court issued conservatory orders restraining the 3<sup>rd</sup> Respondent from arresting, arraigning and/or charging/prosecuting the petitioner herein over any activity or events relating to the said project.
- e) That the petitioner was not allowed to show cause hence contravening his right to fair administrative action.
- f) That the mandate to hear and determine the suspension of the petitioner lies with the 1<sup>st</sup> respondent's Board's Human Resource and Advisory Committee which never sat to make such deliberations.
- g) That the actions of the 1<sup>st</sup> and 3<sup>rd</sup> respondents are tainted with illegality, completely malicious and choreographed to defeat the ends of justice.

3. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed the replying affidavit of Dr. (Eng) John M. Mativo, the Managing Director and Chief Executive Officer of the 1<sup>st</sup> respondent, through Lutta & Company Advocates sworn on 20.11.2023. It was stated and urged as follows:

- a) That he is not privy to the details of the investigations being undertaken by the 3<sup>rd</sup> respondent against the petitioner.
- b) That during a meeting on 15.11.23, with the 1<sup>st</sup> respondent's Board of Directors, he and the Chairman of the Respondents' Board of Directors received a letter from the 3<sup>rd</sup> respondent which was addressed to him and copied to the chairman.
- c) That the said letter informed him of investigations being undertaken by the 3<sup>rd</sup> respondent with regards to loss of public funds involving a contract between the 1<sup>st</sup> Respondent and its contractor M/s Isolux Ingeneria SA and required that in accordance with the law, the petitioner be suspended from duty for a period of twelve (12) months, being a public officer.
- d) That the petitioner being a senior officer of the 1<sup>st</sup> respondent, disciplinary matters are deliberated upon by the Board of

Directors which was coincidentally sitting on that day and they incorporated the issue instead of setting a different date and resolved that the Petitioner be suspended for period of twelve (12) months.

e) That the actions of suspending the petitioner are within the law and his contract of employment has not been terminated.

f) He urged that the petition be dismissed or struck out with costs.

4. Dr. (Eng) John M. Mativo also made a further replying affidavit sworn on 22.11.2023 in opposition to the petition in which he stated that the petitioner had also on 16.03.2022 suspended one Mr. Peter Maina Njehia, Senior Manager, Supply Chain Management, of the 1<sup>st</sup> respondent when the 3<sup>rd</sup> respondent was carrying out investigations against the said officer. He exhibited a copy of the suspension letter (which was erroneously dated 16.03.2021).

5. The 3<sup>rd</sup> respondent also filed its replying affidavit sworn by Robert Rono, an Investigator with the 3<sup>rd</sup> respondent and sworn on 15.01.24 stating as follows:

a) That he is part of the team of investigators where vide inquiry



EACC/F1/INQ/31/2022, the Commission is investigating allegations of procurement irregularities, contract mismanagement and fraudulent payments touching on a contract for the construction of 400KV Transmission Interconnector power line Loyangalani to Suswa and related works, between Kenya Electricity Transmission Company Limited (KETRACO), the 1<sup>st</sup> respondent, and Isolux Ingenieria S.A (Isolux) which exposed Kenyan taxpayers to a loss of Kshs. 18 Billion and led to increased electricity tariffs.

- b) That preliminary findings by the Commission in the course of the investigations described above reveal a scheme of corruption between senior Government officials including the petitioner and private entities.
- c) That the Commission's letter recommending the suspension of the petitioner herein is in line with the law specifically the Leadership and Integrity Act.
- d) That the conservatory orders issued in HCCHR Petition No. E111 of 2023 are only specific to arresting, arraigning or

charging and prosecuting the petitioner.

e) That the Commission's recommendation for the petitioner's suspension was necessary as it enhances constitutional values to safeguard the integrity of investigations of the magnitude described herein in addition to the principles of public interest, good governance and accountability.

f) He prayed that the court disallows the petition with costs.

6. The petitioner filed a further affidavit sworn on 01.03.2024 and reiterated his positions in his previous affidavits. He further stated and urged as follows:

a) After his suspension someone was appointed to act for 6 months as per the public service regulations which is a plan to fill his position.

b) The 3<sup>rd</sup> respondent had by its letter completed investigations and no investigations were pending.

c) That the 3<sup>rd</sup> respondent has not annexed an evidence linking him to the fraudulent invoicing of Kshs. 18 Billion.

7. Similarly, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a reply to the petition dated 13.02. It was urged as follows:



- a) The Court is divested of the jurisdiction to entertain the petition because of the doctrine of constitutional avoidance.
- b) The suspension on account of alleged corruption is an issue falling under the jurisdiction of the High Court and not the Employment and Labour Relations Court.
- c) The 1<sup>st</sup> and 2<sup>nd</sup> respondents admit the description of the parties to the petition as pleaded in the petition.
- d) The Board resolved to suspend the petitioner and it was denied that the 1<sup>st</sup> respondent's Human Resource Policy and Procedures Manual was applicable.
- e) The 3<sup>rd</sup> respondent had not usurped the 1<sup>st</sup> respondent's powers of disciplinary control as no disciplinary proceedings had been commenced or been initiated.
- f) The conservatory orders in High Court Constitutional and Human Rights Division Petition No. E111 of 2023 did not bar the 3<sup>rd</sup> respondent from investigating the petitioner.
- g) The 3<sup>rd</sup> respondent recommended the suspension of the petitioner in exercise of its constitutional mandate pending investigation and to avert interference in the investigations.

h) It is admitted that the petitioner was not served a notice to show cause prior to the suspension but the petitioner's rights were not infringed because no disciplinary action had been commenced against the petitioner as at the time of the suspension. The 1<sup>st</sup> and 2<sup>nd</sup> respondent admit that they acted upon the 3<sup>rd</sup> respondent's recommendation and that in that case the 1<sup>st</sup> respondent's Human Resource Policy and Procedure Manuals was inapplicable. The petitioner was suspended and the suspension was procedural. The suspension was to enhance the values in chapter 6 of the Constitution on Leadership and Integrity per 3<sup>rd</sup> respondent's constitutional mandate. The decision to suspend was not illegal or malicious as alleged for the petitioner. Mr. Peter Maina Njehia, Senior Manager, Supply Chain Management of the 1<sup>st</sup> respondent was suspended on 16.03.2022 when the 3<sup>rd</sup> respondent was carrying out investigations against the said Peter Maina Njehia.

i) The law does not contemplate carrying out of a hearing prior to suspending a public officer upon a recommendation by the

3<sup>rd</sup> respondent to suspend the officer to pave way for investigations into suspected cases of corruption.

j) The contract of service is subsisting and the petitioner would be reinstated if exonerated after the investigation.

8. Final submissions were filed for the parties. The Court has considered all the material on record and returns as follows.

9. To answer the **1<sup>st</sup> issue**, the Court returns that the factual background to the petition is not in dispute. The 1<sup>st</sup> respondent suspended the petitioner pursuant to the recommendation of the 3<sup>rd</sup> respondent and nothing else.

10. To answer the **2<sup>nd</sup> issue**, the jurisdictional objection raised for the 1<sup>st</sup> and 2<sup>nd</sup> respondent was effectively addressed in the ruling delivered by the Court on 30.11.2023. While the 1<sup>st</sup> and 2<sup>nd</sup> respondents purport to revive the jurisdictional objection by alleging constitutional avoidance, no such avoidance has been established. There is no established alternative statutory, constitutional or other remedy for the matter in dispute in the instant petition and which can be said to have been available to the petitioner in the circumstances. In the ruling, the Court found that

the dispute arises out of the sole relationship between the 1<sup>st</sup> respondent and the petitioner, based upon the concluded and prevailing contract of service. Pursuant to provisions of section 12 of the Employment and Labour Relations Act, Articles 22, 162(2) (a) and 165 (5) (b) of the Constitution, the Court enjoys the exclusive original jurisdiction to hear and determine the petition. While finding that the Court has jurisdiction, the Court has considered and been guided by the judgment of the Supreme Court in Kenya Tea Growers Association and 2 others -Vesus- The National Social Security Fund Board of Trustees and 7 others Petition E004 of 2023 as consolidated with Petition No. E002 of 2023 (Koome CJ & P; Mwilu DCJ & V-P; Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ) delivered on 21.02.2023. At paragraph 75 of the Judgment, the Supreme Court with reference to section 12(2) of the Employment and Labour Relations Court Act concluded thus, **“From the above provisions of the Constitution and the Act, it is clear that the jurisdiction of the ELRC is limited in terms of the types of disputes and the parties.”** Further, **“[83] Can it be said that the parties herein are**

not among the disputants contemplated under Section 12(2) of the ELRC Act? Even where the Act stipulates that a complaint, application or suit may be lodged against the Cabinet Secretary for Labour or any office established by law for that purpose? Or that the nature of the dispute is not one that falls within the jurisdiction of the ELRC, even where, as in this case, both employers and employees, trade unions, and workers associations are decrying what they consider to be the adverse effect of a new law on their working conditions? We are in agreement with the Court of Appeal to the effect that this dispute did not arise strictly from an employer-employee relationship. But what about the other aspects of the dispute? What meaning is to be ascribed to the phrase “labour relations”?” Further, “[79] In our view, there is nothing in the Constitution, the ELRC Act, or indeed in our decision in the Karisa Chengo Case to suggest that in exercising its jurisdiction over disputes emanating from employment and labour relations, the ELRC Court is precluded from determining the constitutional validity of a statute. This is

especially so if the statute in question lies at the centre of the dispute. What it cannot do, is to sit as if it were the High Court under Article 165 of the Constitution, and declare a statute unconstitutional in circumstances where the dispute in question has nothing or little to do with employment and labour relations within the context of the ELRC Act. But, if at the commencement or during the determination of a dispute falling within its jurisdiction, as reserved to it by Article 162 (2) (a) of the Constitution, a question arises regarding the constitutional validity of a statute or a provision thereof, there can be no reason to prevent the ELRC from disposing of that particular issue. Otherwise, how else would it comprehensively and with finality determine such a dispute? Stripping the Court of such authority would leave it jurisdictionally humstrung; a consequence that could hardly have been envisaged by the framers of the Constitution, even as they precluded the High Court from exercising jurisdiction over matters employment and labour pursuant to Article 165 (5) (b). We are therefore in agreement with the appellants' submissions



**regarding this issue as encapsulated in paragraph 69 of this Judgment.”**

11. The 3<sup>rd</sup> issue is whether the suspension of the petitioner by the 1<sup>st</sup> respondent upon the recommendation of the 3<sup>rd</sup> respondent and nothing else was lawful or fair. The suspension was with respect to the petitioner's contract of service as a public officer in employment of the 1<sup>st</sup> respondent. The Court as submitted for the 3<sup>rd</sup> respondent, nothing prevents the 3<sup>rd</sup> respondent from recommending to a public service employer to suspend a given public officer. As submitted for the respondents, section 42(7) of the Leadership and Integrity Act provides that subject to the Constitution and any regulations for the enforcement of the Code made under the Act, a state officer may be suspended from office pending the investigation and determination of allegations made against that state officer where such suspension is considered necessary. Section 52 (1) of the Act states that pursuant to Article 80(c) of the Constitution, the provisions of Chapter Six of the Constitution and Part II of the Act except section 18 shall apply to all public officers as if they were state officers. Now, the Court

observes that section 42(7) on suspension applies but subject to the Constitution and regulatory provisions. What is the Constitutional and statutory regime on suspension of public officers? The Court identifies the following pertinent constitutional and statutory provisions. Article 236 (b) on protection of public officers states that a public officer shall not be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law. The Public service Commission Act, 2017 is an Act of Parliament to make further provision as to the functions, powers and the administration of the Public Service Commission established under Article 233 of the Constitution; to give effect to Article 234 of the Constitution and for connected purposes. Part XII of the Act is on the exercise of disciplinary powers and functions and section 71 thereof on suspension of a public officer states thus:

**(1) Where a public officer has been charged with a serious criminal offence, an authorized officer shall suspend the public officer from the exercise of the functions of the public office pending consideration of the public officer's case under this**

Act.

(2) An authorized officer may suspend a public officer against whom proceedings for dismissal have been taken if, as a result of those proceedings, the authorised officer determines that the public officer ought to be dismissed.

(3) A public officer who is suspended shall receive a half basic salary and full house allowance but other benefits shall be withheld by the authorised officer: Provided that an officer on suspension shall be paid medical allowance or medical insurance premium remitted whichever is the case.

(4) Where a public officer has been suspended but is not dismissed or otherwise punished under this Act, any salary, allowances or any other benefit withheld under this section shall be restored to the public officer upon termination of such proceedings.

(5) Where a public officer has been suspended and the public officer is not dismissed but a penalty under this Act is imposed, any salary, allowances or any other benefit withheld under this section shall not be restored upon termination of such

proceedings: Provided that upon termination of such proceedings, the officer shall be reinstated to the public office held at the commencement of the proceedings or demoted in accordance with the prevailing terms and conditions of service applicable to the office and with effect from the date of the decision to terminate the proceedings. (6) A public officer who is suspended shall not leave the duty station without the permission of the authorized officer or of any public officer who is empowered to give such permission on behalf of the authorized officer

12. The Court observes that the provisions of section 71 of the Public Service Commission Act, 2017 have been correctly lifted into the 1<sup>st</sup> respondent's Human Resources Policy and Procedures Manual of June 2019. Clause 11.13 of the Manual provides that an officer may be suspended from duty under the following circumstances:
- (a) when disciplinary proceedings have been instituted against the officer as a result of which, the Managing Director through the advise of their Human Resource Advisory Committee considers that the officer ought to be dismissed; or
  - (b) when he has been

convicted of a serious offence. As submitted for the petitioner, the mentioned conditions have not been shown to accrue in the impugned petitioner's suspension. The Court finds that the suspension is unconstitutional as it is unreasonable for being imposed in violation of Article 236 (b), Article 47 on reasonableness, Article 41 on fair labour practices, section 71 of the Public Service Commission Act, 2017 on preconditions and parameters for imposing suspension and clause 11.13 of the 1<sup>st</sup> respondent's Manual on criteria and preconditions on imposing suspension.

13. The Court has considered the imposition of provisions of the Leadership and Integrity Act upon Public Officers by reference. While such imposition is consistent with Article 80 of the Constitution, it is also true that the Public Officer Ethics Act, 2003 is the primary legislation that applies to public officers with respect to their ethics, integrity and observance of the Public Officer Code of Conduct and Ethics. Section 35 of the Act on investigations of breaches of the Code of Conduct and Ethics provides thus:

**(1) The responsible Commission for a public officer may**

investigate to determine whether the public officer has contravened the Code of Conduct and Ethics.

(2) An investigation may be made on the Commission's own initiative or pursuant to a complaint by any person.

(3) The Commission may refer a matter to another appropriate body for investigation and that body shall investigate the matter within a reasonable time and submit a report to the Commission on its findings.

(4) An investigation may be conducted even if the subject of the investigation has ceased to be a public officer.

Further, section 36 of the Act on disciplinary action in event of breach of the Code of Conduct and Ethics provides as follows:

(1) If an investigation discloses that the public officer has contravened the Code of Conduct and Ethics, the responsible Commission shall, within the time period prescribed by subsection (2)-

(a) take the appropriate disciplinary action; or

(b) if the responsible Commission does not have the power to take the appropriate disciplinary action, refer the matter to a



body or person who does have that power.

(2) The time period referred to in subsection (1) is-

(a) within thirty days after the completion of the investigation;

or (b) if another body investigated the matter under section 35

(3), within thirty days after the responsible Commission receives the report of that body.

(3) The responsible Commission shall inform the public officer concerned of any action it takes or intends to take under subsection (1) before it takes the action or within thirty days after it does so.

(4) Subsection (3) does not affect any legal requirement to inform a public officer earlier than is required under that subsection.

(5) The regulations made under section 42 may govern what disciplinary action is appropriate for the purposes of subsection (1).

14. In view of the cited provisions of the Public Officer Ethics Act, 2003, the Court returns that there are adequate statutory provisions for dealing with unethical behaviour or conduct by public officers

and imposition of any punishment must be within the prevailing powers of the concerned public service employer or prescribed authority to exercise disciplinary control per the prescribed constitutional, statutory, regulatory and lawful policy provisions or safeguards. The Court holds that no public officer is summarily removable from a public office except in accordance with such safeguards and only by exercise of the power of disciplinary control by the lawful person, body or authority. The impugned suspension in the instant case is clearly imposed free from the prevailing safeguards that protected to petitioner. It amounted to unlawful, unconstitutional and summary removal of the petitioner from office and the 1<sup>st</sup> and 2<sup>nd</sup> respondents have admitted that it was devoid of the terms and conditions of service and the provisions of the Manual. The Court finds for the petitioner accordingly.

15. The prayers in the petition will succeed with the exception that no damages will be payable in view that the petitioner will continue service with full benefits unless the contract of service is lawfully terminated.

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

- 1) The declaration that the suspension of the petitioner was irregular, unprocedural, illegal, unconstitutional as found in this Judgment hence null and void *ab initio*.
- 2) The 1<sup>st</sup> respondent is hereby directed to unconditionally revoke the suspension of the petitioner from employment and order for his immediate reinstatement or resumption of duty.
- 3) The 1<sup>st</sup> respondent is hereby directed to pay the petitioner any pending salaries, allowances and benefits accrued to him while on the impugned suspension.
- 4) The order hereby issued revoking the letter dated 15<sup>th</sup> November 2023 suspending the petitioner herein.
- 5) The order hereby revoking the decision of the 2<sup>nd</sup> respondent contained in the letter dated 15<sup>th</sup> November 2023 directing the Board of the 1<sup>st</sup> respondent to suspend the petitioner herein.
- 6) The order hereby revoking the decision of the 1<sup>st</sup> respondent contained in the letter dated 15<sup>th</sup> November 2023 suspending

the petitioner herein.

- 7) The order hereby issue restraining the respondents by either themselves, employees, servants or agents from terminating the employment of the petitioner based on the illegal suspension.
- 8) The petitioner's costs of the petition be paid by the 1<sup>st</sup> respondent and the respondents to bear own costs of the proceedings.

**Signed, dated and delivered by video-link and in court at Nairobi  
this Monday 8<sup>th</sup> April 2024.**

  
**BYRAM ONGAYA  
PRINCIPAL JUDGE**