



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTION AND HUMAN RIGHTS DIVISION

PETITION NO. 273 OF 2018

WYCLIFFE OUMA OMONDI.....PETITIONER

VERSUS

NINE ONE ONE GROUP LIMITED.....1ST RESPONDENT

JOSEPH K. GITAU t/a LINKS TRUCK AND EQUIPMENT.....2ND RESPONDENT

GEORGE AOL.....3RD RESPONDENT

JUDGEMENT

1. The Petitioner, Wycliffe Ouma Omondi, filed an amended petition and supporting affidavit dated 5th December, 2018 claiming that during his employment by the 1st Respondent, Nine One One Group Limited, as a security guard, he inadvertently assisted in the theft of an old truck rim on 27th June, 2018 from the premises of the 2nd Respondent, Joseph K. Gitau t/a Links Truck and Equipment. The 3rd Respondent, George AOL, was the Petitioner's supervisor at the time material to his claim.

2. The Petitioner avers that on the material day he was assigned to guard the 2nd Respondent's store. His case is that he carried the rim to the gate of the 2nd Respondent on the instructions of one Mr Anthony Ndwiga who led him to believe that he (Mr. Anthony Ndwiga) had been gifted the rim by employees of the 2nd Respondent. The Petitioner avers that when it was discovered that the rim was missing, the 2nd Respondent hired five men to assault, threaten and torture him so as to extract information on the location of the rim.

3. The Petitioner states that his rights under Articles 28, 29(c), (d), (e) & (f), and 47 were infringed by the actions of the 2nd Respondent and that the actions of the 2nd Respondent have affected his physical and mental well-being and he continues to suffer trauma, pain and damage to date.

4. The Petitioner prays that the Court grant the following orders:

a. A declaration that the Respondents' actions have breached the Petitioner's Constitutional Rights and freedoms under Articles 28, 29(c) (d) (e) & (f) and 47 of the Constitution of the Republic of Kenya, which includes Right to Human Dignity, Right not to be subjected to psychological torture, right not to be subjected to inhuman and degrading treatment, right to fair administrative action, right to fair hearing, right to be subjected to the rule of law.

b. A declaration that the Petitioner is entitled to the payment of damages and compensation for the violations and contraventions of his fundamental rights and freedoms under the aforementioned provisions of the Constitution.

c. General damages consequential to the declaration of violations of the fundamental rights and freedoms of the Petitioner in prayer (a) above as may be assessed by this Honourable Court.

d. Aggravated, punitive and/or exemplary damages for the arbitrary, highhanded and oppressive conduct by the 1st and 2nd Respondents towards the Petitioner.

e. The Costs of this Petition be awarded to the Petitioner.

5. The Petitioner filed respective responses to the 1st and 3rd respondents' grounds of opposition dated 3rd December, 2018. The Petitioner asserts that there was no misjoinder of the 1st Respondent as his employer and the 3rd Respondent as the employee of the 1st Respondent.

Further, that the 1st and 3rd respondents were made aware of the fact that the 2nd Respondent had a gun and that he tended to threaten people that he will harm them using the said gun.

6. The Petitioner further alleges that the 1st and 3rd respondents were both made aware of the perilous environment created by the 2nd Respondent yet the 1st Respondent through the 3rd Respondent convinced the Petitioner to take part in a meeting with the 2nd Respondent despite his hesitation and without deploying any security measures to keep him safe. Moreover, the Petitioner complains that despite knowing of the torture by midday the 1st and 3rd respondents did not take any measures to protect him or alert police officers of what was happening.

The 1st and 3rd Respondents' Case

7. The 1st and 3rd respondents filed a notice of preliminary objection dated 18th October, 2019 claiming that the Court has no jurisdiction over the matter as the cause of action against the 1st and 3rd respondents arises from an employment relationship which can only be determined by the Employment and Labour Relations Court as per the provisions of Article 162 of the Constitution and the Employment and Labour Relations Court Act, 2011.

8. The 1st Respondent also filed a reply to the petition dated 15th February, 2019 asserting that there had indeed been a theft of a tyre rim from the 2nd Respondent's premises which was reported on 28th June, 2018, and the CCTV footage of the material site implicated the Petitioner in the incident.

9. The 1st Respondent avers that the Petitioner was afforded an opportunity to state his version of events. It is further stated that on 7th July, 2018, the 1st Respondent's Operations Manager received a call from the 3rd Respondent that the Petitioner and others were being interrogated forcefully by the 2nd Respondent. The 1st Respondent claims that it requested the 2nd Respondent to refer the dispute to the Embakasi Police Station.

10. It is further averred that the 1st Respondent sent a back-up team to the Petitioner's work station and the Petitioner appeared injured. Further, that an employee of the 1st Respondent rushed the Petitioner to hospital. The 1st Respondent insists that it is a stranger to the allegation of human rights violations and torture expressed in the petition, and prays that the petition be dismissed.

11. The 3rd Respondent filed a reply to the petition dated 15th February, 2019, denying the petition in its entirety for want of cause of action against him.

12. It is deposed that on 7th July, 2018 the 3rd Respondent accompanied the Petitioner to the 2nd Respondent's premises where the Petitioner was questioned and revealed that the 2nd Respondent's employees were involved in the theft incident at the 2nd Respondent's warehouse. Thereafter the Petitioner was asked to join the 2nd Respondent at a different site, and after some time the 3rd Respondent heard screams emanating from the direction where the 2nd Respondent and Petitioner had proceeded to. The 3rd Respondent then called the 1st Respondent for help, and a back-up team was sent which took the Petitioner to hospital.

13. The 3rd Respondent asserts that he is a stranger to the allegations of human rights violations and did not execute any of the actions complained of.

The 2nd Respondent's Case

14. The 2nd Respondent opposed the petition through an affidavit sworn on 12th September, 2018 by Lee Kamau Kangethe. This was prior to the amendment of the petition which resulted in Joseph K. Gitau being named as the 2nd Respondent.

15. Through the said affidavit Mr. Kangethe averred that the matters raised in the petition related to issues arising from an employment relationship and the same ought to have been raised in the Employment and Labour Relations Court.

16. Mr. Kangethe averred that he did not own any business known as Links Trucks and Equipment neither did he trade under such a name as he was just a 21-year old student pursuing an undergraduate course at Daystar University. His testimony was that he occasionally visited the premises housing the business known as Links Trucks and Equipment which was owned by his relative.

17. Mr. Kangethe denied being at the business premises on any date between 27th June, 2018 and 5th July, 2018 as he was busy preparing for his examinations. He also strongly rejected the claim that he threatened or participated in the alleged torture of the Petitioner. He additionally deposed that he did not know and had never met Mr. Ndwiga, Mr. William Onyango, Mr. Samuel Ochogi, Mr. Kosgei, Mr. George Aol and a person known as Jeff.

18. Mr. Kangethe averred that upon being served with the court papers in this case he made enquiries and he was informed that the Petitioner was being sought by the police over an allegation of theft and this petition was therefore a misguided attempt by the Petitioner to try and defeat the course of justice.

The Petitioner's Submissions

19. Through submissions dated 21st January, 2019 the Petitioner contends that contrary to the respondents' claim that this Court has no

jurisdiction to hear and determine this petition, this Court has jurisdiction under Articles 23(1) and 165(3)(b) & (d)(i) of the Constitution. The Petitioner acknowledges that magistrates have jurisdiction to deal with matters concerning torture under Section 8 of the Magistrates' Court Act, however, their jurisdiction does not extend to issuance of compensation for loss or damage suffered. It is therefore the Petitioner's case that this is the only Court that can hear and determine the matter.

20. On the respondents' assertion that this is a matter between an employer and employee hence falling within the jurisdiction of the Employment and Labour Relations Court, the Petitioner submits that the substantive case is against the 2nd Respondent who has no employer-employee relationship with the Petitioner. The Petitioner relies on the interpretation of employer-employee relationship provided by the courts in **Nick Githinji Ndichu v Clerk Kiambu County Assembly and Another [2014] eKLR**; **Okiya Omtatah Okiiti v President of Kenya & 9 others [2016] eKLR**; and **George Onyango Ochieng v Chemelil Sugar Company Ltd [2016] eKLR**.

21. Turning to the question as to whether the Bill of Rights can be enforced against private citizens, the Petitioner submits that the Constitution applies both vertically and horizontally to the relationship between the government and citizens, and the relationship between private persons. Reliance is placed on the decisions in **Mike Rubia & another v Moses Mwangi & 2 others [2014] eKLR**; **Law Society of Kenya v Betty Sungura Nyabuto & 2 others [2012] eKLR**; **B.A. & another v The Standard Group Ltd [2012] eKLR**; and **Baobab Beach Resort and Spa Limited v Duncan Muriuki Kaguuru & another [2017] eKLR**.

22. It is the Petitioner's case that Section 4 of the Prevention of Torture Act, 2016 which limits the act of torture to a vertical basis does not accord with the Constitution which advocates for the application of the Bill of Rights in both a vertical and horizontal manner. It is the Petitioner's case therefore that Section 4 of the Prevention of Torture Act, 2016 or the Act in its entirety is unconstitutional to the extent that it limits the application of Article 29(d) on private persons who engage in acts or omissions that amount to torture.

23. The Petitioner while relying on the annexures to his supplementary affidavit submits that the manner in which he was handled was not only in violation of his constitutional rights under Article 28 but also in violation of his right to freedom and the security of his person under Article 29(c), (e) & (f) of the Constitution. The Petitioner argues that his treatment at the hands of the 2nd Respondent met all the elements of torture as determined in **Irene Wambui Muchai & 5 others v Attorney General (supra)**.

24. On his claim that the respondents violated Article 28, the Petitioner submits that the way he was handled in a degrading manner by the 2nd Respondent under the watch of the 3rd Respondent and by extension the 1st Respondent violated his constitutional right to human dignity.

25. It is contended that the 1st and 3rd respondents had the duty of care to protect the Petitioner's right to human dignity. The Petitioner contends that he has met the requirement for production of evidence as held in **Josephat Koli Nanok & another v Ethics and Anti-Corruption Commission [2018] eKLR** through annexures 'WOO-02a', 'WOO-02b', 'WOO-03', 'WOO-04', 'WOO-07', and 'WOO-08' to his supporting affidavit and has therefore established that his right to dignity was violated.

26. The Petitioner asserts that the 1st and 3rd respondents in their grounds of opposition dated 16th August, 2018 did not contest the veracity of the facts he presented and they therefore confirm the facts as they are. The facts being that the 1st and 3rd respondents presented the Petitioner to the 2nd Respondent despite being informed of the perilous environment. Reliance is placed on the holding in **Securix Agencies (K) Limited v Bernard Ochieng Olute [2009] eKLR**.

27. The Petitioner further complains that the 1st and 3rd respondents left him to be tortured and failed to take any action to call the police or come to his rescue despite the 1st Respondent's offices being less than four hundred metres away from the scene and the 3rd Respondent having made several calls to the 1st Respondent to come and save him.

28. On the question as to who should meet the costs of the petition, the Petitioner relies on the decision in **John Muruge Mbogo v Chief of the Kenya Defence Forces & another [2018] eKLR** and prays that the respondents should pay for the costs of the petition.

The 1st and 3rd Respondents' Submissions

29. The 1st and 3rd respondents through their submissions dated 2nd June, 2019 submit that the facts as presented to the Court by the Petitioner reveal no act of wrongdoing or bad faith on their part, nor do they reveal any plot, conspiracy or pact to harm or humiliate the Petitioner. The 1st and 3rd respondents assert that the 2nd Respondent is implicated in almost all the elements of torture as per the decision in **Irene Wambui Muchai & 5 others v Attorney-General [2017] eKLR**, and they are not faulted for causing any direct physical or mental harm upon the Petitioner.

30. It is also contended that the Petitioner has failed to demonstrate that the 1st and 3rd respondents were aware of the 2nd Respondent's tendency to use his gun in a threatening manner. The 1st and 3rd respondents vehemently oppose any link between the knowledge of the said gun and malicious intentions since gun ownership is allowed in Kenya within certain provisions of the law.

31. The 1st and 3rd respondents submit that there can be no liability without fault and therefore they cannot be held liable as no fault on their part has been proven by the Petitioner. This assertion is supported by reference to **Kisii HC Civil Suit No. 264 of 2009, Nicholas Angwenyi Siro t/a Riverside Continental Resort Limited v Finlay Kirui & another**. Furthermore, it is submitted that as much as an employer is liable for the health and safety of his employees this cannot be extended to criminal assault by third parties. They buttress this statement by citing the case of **Statpack Industries v James Mbithi Munyao [2005] eKLR**.

32. The 1st and 3rd respondents contend that the claims raised by the Petitioner are related to the law on assault and criminal liability and ought to be directed at the 2nd Respondent. In relying on the decision in **Nairobi Constitutional Petition 223 of 2011, Hon. Gidion Mbuvi**

Kioko alias Sonko v The Hon. Attorney General & 2 others it is urged that personal injury claims are better resolved without resorting to the Constitution.

33. Consequently, the 1st and 3rd respondents pray that this Court dismisses this matter as it does not meet the threshold of a constitutional case.

The Analysis

34. Upon review of the pleadings and submissions of the parties, I find that the issues for determination are:

- a) The question of jurisdiction;
- b) Whether the Petitioner has established a cause of action against the 1st and 3rd respondents;
- c) Whether the Petitioner has established that his rights under Articles 28, 29(c), (d), (e) & (f), and 47 of the Constitution were infringed by the 2nd Respondent;
- d) Whether the Petitioner is entitled to the reliefs sought; and
- e) The issue of costs.

The 1st and 3rd Respondents' Liability

35. The question of this Court's jurisdiction arises on two fronts. The 1st and 3rd respondents in their first line of attack urged this Court to find that it has no jurisdiction to handle this matter as it is all about employer-employee relationship hence a matter for the determination of the Employment and Labour Relations Court. The Petitioner's answer to this argument is that the main violator of his constitutional rights and fundamental freedoms is the 2nd Respondent who had no contractual relationship with him. That is indeed a correct statement and there is no need for any other additional reason as to why this Court has jurisdiction to handle the Petitioner's claim. The respondents' claim that this is a matter for the Employment and Labour Relations Court is therefore without merit. Although the Petitioner was allegedly assaulted at the station where he had been deployed to work by the 1st Respondent, his duties did not include being assaulted once in a while by the 2nd Respondent. Therefore, the assault on the Petitioner did not fall within his line of work.

36. The second line of attack by the 1st and 3rd respondents is premised on Section 4 of the Prevention of Torture Act, 2017. The 1st and 3rd respondents contend that they are not public officers and the cited provision excludes them from being found to have violated the provisions of Article 29 of the Constitution. The Petitioner's belated response was an attack on the constitutionality of the said provision. I say belated because the Petitioner never sought in his pleadings to have Section 4 of the Prevention of Torture Act, 2017 declared unconstitutional for implying that torture can only be committed by public officials or under their supervision.

37. In my view, I cannot proceed to determine whether a statutory provision is unconstitutional when the matter has not been pleaded and is raised in rudimentary submissions in the absence of the Attorney General who is the protector of the laws of the Republic of Kenya. This statement does not in any way override the principle of the supremacy of the Constitution as established in Article 2, which among other things, declares any law, including customary law, that is inconsistent with the Constitution to be void to the extent of the inconsistency. In order to determine whether the rights of the Petitioner have been violated by the respondents who are private persons, I need to determine whether the constitutional provisions cited by the Petitioner are horizontally applicable in the circumstances of his case.

38. Previously a Constitution was meant to regulate the relationship between the individual and the State. It was reasoned that the State is more powerful than the individual and there was need to check the deployment of State powers. Newer constitutions like the Kenyan Constitution now appreciate that private abuse of human rights can be equally as harmful as violation of rights by the State. The Bill of Rights is not therefore confined to violation of rights by the State but extends to violation of rights of individuals by other individuals. The application of the Bill of Rights to the relationship between the State and the individual is referred to as vertical application whereas the application of the Bill of Rights to the relationship between one individual and another is known as horizontal application.

39. Section 4 of the Prevention of Torture Act, 2017 appears to preclude the horizontal application of Article 29 of the Constitution by stating that:

For the purposes of this Act, "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person-

(a) for the purposes of-

(i) obtaining information or a confession from him or her or any other person;

(ii) punishing him or her for an act he or she or any other person has committed, is suspected of having committed or is planning to commit; or

(iii) intimidating or coercing him or her or any other person to do, or to refrain from doing, anything; or

(b) for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public officer or a person acting on behalf of a public officer, but does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

40. Article 29 itself does not appear to impose limitation on its horizontal application as it simply states that:

Every person has the right to freedom and security of the person, which includes the right not to be—

- (a) deprived of freedom arbitrarily or without just cause;
- (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;
- (c) subjected to any form of violence from either public or private sources;
- (d) subjected to torture in any manner, whether physical or psychological;
- (e) subjected to corporal punishment; or
- (f) treated or punished in a cruel, inhuman or degrading manner.

41. Nevertheless, Section 4 of the Prevention of Torture Act, 2017 is in accord with international instruments. For instance, Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines the term “torture” as follows:

“... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

42. Even after the commencement of the Prevention of Torture Act, 2017 on 20th April, 2017, Kenyan courts continued to adopt the definition of “torture” in line with Article 1 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. An example is the decision in **Irene Wambui Muchai & 5 others v Attorney General [2017] eKLR** which was delivered on 6th June, 2017 where the elements of torture were highlighted as follows:

“49. What is the law on torture in any event? It is now trite that the following elements must be present in proof thereof:

- i) There must be evidence of severity of pain and suffering – Article 1 of the Convention against Torture is the leading provision on this point.
- ii) There must be an intent in reckless indifference to the possibility of causing pain and suffering - in *J. Burgers and H. Danelius, The United Nations Convention Against Torture*, (Martinus Nijhoff, 1988) page 118, this point is powerfully made.
- iii) Acts that do not cause extreme pain and suffering to an ordinary person are normally outside the definition of torture – in *Sarah Joseph and Melissa Castain, The International Covenant on Civil and Political Rights, Third Edition*, page 218, this element is extensively discussed.
- iv) The act of torture must involve a public official – in Article 1 of the Convention against Torture expresses this point clearly.”

43. The law as briefly highlighted above would then lead to the inevitable conclusion that the Petitioner’s case is not covered by Article 29 of the Constitution. The Petitioner was not assaulted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. I will, however, not base my determination on that finding alone. I will instead heed the warning in **Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others [2014] eKLR** that:

“68. It must be obvious by now that not only do we find that we have jurisdiction to entertain the dispute before us, but that we consider the fact that the 1st respondent is a private members club to be of limited relevance to the issues at hand. The respondents cannot be allowed to wave a private entity card to bar this Court, when properly moved, from assuming jurisdiction where there are allegations of breach of fundamental rights and freedoms by its members or any other person. It cannot be safe, in a progressive democratic society, to arrive at a finding that allows private entities to hide behind the cloak of ‘privacy’ to escape constitutional accountability. We think that it would be to accord a narrow, constricted interpretation to our Supreme Law, contrary to the canons of constitutional interpretation that have for ages infused our judicial system and which now find constitutional sanction under Article 259 to accede to such a proposition.

69. To accede to the respondents’ proposition that private entities are insulated from the constitutional duty to respect and

uphold fundamental rights, to hold that private entities are completely shrouded by their private cloak from this Court's scrutiny is we believe, to reverse the intention of the framers of the Constitution. It is to strip individual Kenyans of the very constitutional protection that the Constitution of Kenya 2010 meant to jealously guard and leave them exposed and vulnerable in private dealings. This would effectively render the constitutional protections of little or no practical value to the very persons designed to enjoy its protections and would, in our view, amount to abdication of this Court's primary responsibility conferred upon it by the people of Kenya."

44. Nevertheless, the question as to whether this is a dispute for determination through a constitutional petition remains unanswered. The Privy Council in **Harrikissoon v Attorney-General of Trinidad and Tobago** [1980] AC 265 was the opinion that not every dispute should result in the invocation of the Constitution. In that regard the Court stated that:

"The notion that whenever there is a failure by an organ of Government or a Public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action....the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the Court under the subsection if it is apparent that the allegation is frivolous, vexatious or abuse of the process of the Court as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."

45. The principle was restated in **Attorney General of Trinidad and Tobago v Ramanoop** [2006] 1 AC 328 as follows:

"In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.

That said, their Lordships hasten to add that the need for the courts to be vigilant in preventing abuse of constitutional proceedings is not intended to deter citizens from seeking constitutional redress where, acting in good faith, they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled. But "bona fide resort to rights under the Constitution ought not to be discouraged": Lord Steyn in *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294, 307, and see Lord Cooke of Thorndon in *Observer Publications Ltd v Matthew* (2001) 58 WIR 188, 206."

46. Kenyan courts have upheld the principles of exhaustion of alternative dispute resolution mechanisms and constitutional avoidance. For instance in **Bernard Murage v Fineserve Africa Limited & 3 others** [2015] eKLR it was held that:

"There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute....

I am bound to follow that principle of law since it flows from the other important principle that not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first."

47. The Court of Appeal discouraged the misuse of constitutional litigation in **Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another** [2016] eKLR by stating that:

"Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation.

... this Court has severally held that where a fundamental right is regulated by legislation, such legislation, and not the underlying constitutional right, becomes the primary means for giving effect to the constitutional right....

Of course violations of constitutional rights may nonetheless be different, and more serious than the violations of statutory or contractual rights. There is no clear demarcation however, where one violation begins and ends, and when one violation should attract desperate remedies. In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. The Constitution should not be turned into a thoroughfare for resolution of every kind of common grievance.

A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.”

48. The constitutional avoidance principle was indeed approved by the Supreme Court in the case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR**.

49. The question therefore is whether the Petitioner’s case discloses a constitutional dispute. My answer is that it does not. The facts placed before the Court simply disclose an assault that can be remedied through the criminal justice system and compensated by way of filing a civil claim. Allowing the Petitioner to succeed in this claim will open a floodgate for similar claims that will not only result in chaos in legal practice but also render the other dispute resolution mechanisms redundant. The Petitioner’s case has no special feature that would entitle this Court to open the door to him.

50. It is observed that more and more litigants are filing ordinary disputes as constitutional petitions. Their actions are not only wasting the courts’ time but also deny those with genuine constitutional issues an opportunity to have their matters quickly resolved. This malaise is not unique to Kenya but affect other jurisdictions. The reasons informing the litigants’ decision appears to be similar. In **Attorney General of Trinidad and Tobago v Ramanooop [2006] 1 AC 328** it was observed that:

“...The explanation for the continuing misuse of this jurisdiction seems to be that proceedings brought by way of originating motion for constitutional relief are less costly and lead to a speedier hearing than proceedings brought by way of writ.

From an applicant’s point of view this reason for seeking constitutional relief is eminently understandable. But this reason does not in itself furnish a sufficient ground for invoking the constitutional jurisdiction. In the ordinary course it does not constitute a reason why the parallel remedy at law is to be regarded as inadequate. Proceedings brought by way of constitutional motion solely for this reason are a misuse of the section 14 jurisdiction.”

51. The instant petition raises no constitutional issue. There are other adequate and efficacious dispute resolution mechanisms that the Petitioner ought to have resorted to. Although the petition discloses a genuine grievance that require resolution through the application of the law, the tool selected by the Petitioner for the execution of that task is the wrong one.

52. In the circumstances, the petition must fail and it does indeed fail and is dismissed with costs to the respondents.

Dated, signed and delivered virtually at Nairobi this 17th day of December, 2020.

W. Korir,

Judge of the High Court