



**Obiero v Metal Crows Limited (Petition 53 of 2019)
[2024] KEELRC 1107 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1107 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 53 OF 2019**

MA ONYANGO, J

MAY 8, 2024

JUDGMENT

**IN THE MATTER OF ARTICLES 2,3,10,19(1) & (2), 20(1) & (2), 22, 23,27(1), 28, 29(A),
41(1), 48,49(1), 50(2), 159,258(1) AND 259(1) OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 41 AND 50 OF THE CONSTITUTION OF KENYA**

IN THE MATTER OF SECTIONS 41, 43, 45, 45(3) OF THE EMPLOYMENT ACT 2007

IN THE MATTER OF THE UNFAIR DISMISSAL/TERMINATION

IN THE MATTER OF WILLICE ODUOR OBIERO

BETWEEN

WILLICE ODUOR OBIERO PETITIONER

AND

METAL CROWS LIMITED RESPONDENT

JUDGMENT

1. The Petitioner filed the instant petition on 04.03.2019 and prayed for:
 - a. A declaration be and is hereby made that the letter of termination of employment dated 23.10.2018 from the Respondent purporting to terminate the Petitioner’s employment is unconstitutional, illegal, unlawful, null and void.
 - b. A declaration be and is hereby made that the Petitioner’s termination was illegal, null and void ab-initio.
 - c. A declaration be and is hereby made that the process leading to the purported termination of the Petitioner’s employment contract dated 2nd September 2016 constituted a violation



of the Petitioner's rights and fundamental freedoms under Articles 27,28,41 and 50 of the Constitution.

- d. A declaration be and is hereby made that the Respondent's action of calling in the police to seize and detain the Petitioner up to the time of his release violated his constitutional rights as set out under articles 27,28, 29(a), 49 (1)(a)(i), (c) & (h) of the constitution.
 - e. A declaration be and is hereby made that the Petitioner be compensated a total sum of ten million Kenya shillings or any other amount that the court deems sufficient and/or appropriate by the Respondent for violation of the Petitioner's rights and fundamental freedoms under articles 27,28,41,49(1)(a)(i)(c) and 50(2)(a)(b)(c)(k) of the constitution and sections 41, 43, 45 and 45(3) of the employment act 2007;
 - f. An order be and is hereby made compelling the Respondent to compensate the Petitioner for unlawful termination that compensation being the salary at the time of the termination multiplied by 12 months that is Kshs.45,000 × 12 months = Kshs.540,000/=
 - g. Interest on prayers (4), (5), (6), (7) at court rates till payment in full
 - h. Costs of this petition
 - i. And any other or further relief as this honourable court may deem fit to grant.
2. The petition was based upon the Petitioner's supporting affidavit and exhibits thereto filed together with the petition and sworn on 29th January 2019 as well as the Supplementary Affidavit sworn on 29th September 2022. The Petitioner's case is as follows:
- a. The Petitioner entered into an employment contract with the Respondent on 2nd September 2016. he was tasked with providing motor vehicle/forklift mechanic services effective 3rd August 2016 at a salary of Kshs.45,000/=
 - b. The Petitioner's job description as a motor vehicle/forklift mechanic was to repair and service the company's motor vehicle which duty at times required that he make recommendations to his superiors for the purchase of both new and used spare parts for the Respondent's motor vehicles.
 - c. The Petitioner's work was entirely manual and from time to time, he was within the Respondent's company in possession of motor vehicle spare parts, either repairing them or fixing them onto a motor vehicle.
 - d. The Respondent has a high security co-ordination system including security guards, CCTV cameras, random searches, sign in and out record books among other secret security enhancement features only known to management.
 - e. Through the entire time of the existence of the employment relationship, the Petitioner undertook his duties with utmost commitment and dedication while yielding timely results.
 - f. On 17th October 2018 at about 3 pm whilst attending to his duties, the Petitioner was arrested by police officers whom he later learnt were from the Industrial Area Police Station.
 - g. Without discussion or identification, the Petitioner was handcuffed, frog-matched across the street and bundled into a waiting police patrol vehicle by the said policemen in the presence of his fellow colleagues. The Petitioner was driven to the Industrial Area Police Station where he was held for more than 24 hours without being questioned, booked in the occurrence book or being charged with any offence known in law.



- h. The Petitioner’s mobile phones were confiscated.
 - i. Upon inquiry by the Petitioner’s wife on the nature and particulars of the offence, she was faced with hostility from the police officers who informed her that they were under instructions to arrest the petition for being in possession of some unspecified company property. The Petitioner was later released without any charge being preferred against him.
 - j. On the Petitioner reporting back to work, he was issued with a termination letter dated 23.10.2018 which stated “the management has consequently lost the trust they had for you and in particular as a person who was entrusted to handle all company vehicles in terms of repairs, sourcing for spare parts and for keeping both old parts and new used parts”
 - k. On 25.10.2018 the human resource manager handed the Petitioner a certificate of service.
3. The Petitioner maintains that the chronology of events surrounding his arrest and release without a criminal charge being preferred against him was a conspiracy by the Respondent to have him arrested by the police in order to lay basis for terminating his lawful employment on the ground of alleged theft.
 4. The Petitioner contends that he was never charged with any offence neither was he found guilty of any offense known in law. That the termination therefore failed to meet the threshold of section 45 of the [employment act](#) and was therefore unfair.
 5. The Petitioner states that he was denied the enjoyment of the rights enshrined under Article 50 (2)(d), (e) (f) of [the constitution](#).
 6. The Respondent filed a replying affidavit of John Karari, the Human Resource Manager, sworn on 03.03.2021 who stated and urged as follows:
 - a. The Petitioner was offered an employment contract as a motor vehicle/forklift mechanic with the Respondent on 3rd August 2016.
 - b. On 17th October 2018 the Petitioner was found in possession of the Respondent’s company property which he neglected, failed and/or refused to surrender to the Respondent’s warehouse for safe custody. Subsequently the Respondent handed over the claimant to the police for investigation.
 - c. On 23.10.2018 the Respondent terminated the Petitioner’s contract pending investigations and paid him his terminal dues to finality.
 - d. On 25.10.2018 the Petitioner was issued with a clearance form upon clearing with all departments of the Respondent.
 - e. The police have a legal duty to investigate any complaint registered and/or reported to them and the Respondent had no capacity to dictate to the police how to conduct such investigations or how to handle the Petitioner.
 - f. The Respondent has a civic duty to report any crime to the police and discharge of such duty cannot be construed to be an infringement on the Petitioner’s constitutional rights as alleged.
 - g. The Respondent maintained that the dismissal of the claimant was justified and the Respondent did not infringe on the claimant’s right in any way.
 7. Directions were given by the court for disposal of the petition by way of written submissions. Submissions were filed for the parties. The Court has considered all the material on record.



8. In the Petitioner's submissions the issues for determination were stated as follows:
 - a. Whether the Petitioner's constitutional rights were violated.
 - b. Whether the Respondent's action of summary dismissal was unfair, wrong and unlawful.
9. For the Respondent the issues for determination were distilled as follows:
 - a. Whether the petition is proper and if so whether there are any constitutional violations;
 - b. Whether there was unlawful and unfair termination of employment;
 - c. Whether the Petitioner is entitled to the reliefs sought.

Analysis and Determination

10. From the pleadings and submissions on record, the court is of the view that the issues for determination are:
 - a. Whether the petition is proper and if so whether there are any constitutional violations;
 - b. Whether there was unlawful and unfair termination of employment;
 - c. Whether the Petitioner is entitled to the reliefs sought.

Whether the petition is properly before court

11. It was the submission of the Respondent that the petition does not meet the threshold of a constitutional petition as the issues raised therein are purely employment and not violations of employment rights. That the suit ought to have been instituted as a regular dispute under section 12 of the *Employment and Labour Relations Court Act*. It is further submitted that the Petitioner has not demonstrated with precision how the articles of *the Constitution* cited in the petition have been violated. It was the Respondent's submission that the petition is incompetent and bad in law as the issue of termination does not meet the threshold of a constitutional petition. It was submitted that the petition is an abuse of court process.
12. In support of its submission the Respondent relied on the decision in FRANCIS ATONYA AYEKA V KENYA POLICE SERVICE & ANOTHER [2017] eKLR where the court held:

“a litigant should not avoid the provisions of the *Employment Act* regarding unfair termination or wrongful dismissal by going behind the statute and seeking to rely directly on Article 41 of *the Constitution* on the right to fair labour practices. The purpose of *the Constitution* is that the right to fair labour practices is given effect in various statutes of which the *Employment Act* and the *Labour Relations Act* are primary.

The primary legislation should not be circumvented by seeking to rely directly on a constitutional provision. Both the *Employment Act* and the *Labour Relations Act* give effect to constitutional rights.”
13. For the Petitioner it was submitted that he was discriminated by being singled out as the only person who was in possession of unspecified company property, his right to human dignity violated by unreasonable arrest, detention and subsequent summary dismissal, his right not to be deprived of freedom and security violated by being held in a police station without being charged with any offence.



14. It is further the Petitioner's averment that the Respondent violated his right under Article 49(1)(a)(i) and (e) and 29 of *the Constitution* being the rights of an arrested person to be informed promptly in a language he understands of the reason for his arrest and the right to communicate with his advocate and other persons whose assistance was necessary.
15. It is further the Petitioner's averment that his rights under Article 50(2) of *the Constitution* were violated.
16. Mativo J. (as he then was) while dealing with a similar issue in the case of *Hakiziman Abdoul Abdulkarim v Arrow Motors EA Ltd & Another* (2017) eKLR had this to say:

“A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.”
17. He cited with approval the holding in the South African case of *Fredricks & Others v MEC for Education & Training, Eastern Cape & Others* (200) 23 (LJ.81) where the court held:

“*The constitution* provides no definition of constitutional matter. What is constitutional matter must be gleaned from reading of *the constitution* itself..... constitutional matters must include disputes as to whether any law or conduct is inconsistent with constitution.”
18. Drawing the line between what is constitutional and what is not is sometimes very elusive and may depend largely on how the issues have been framed in a particular suit, as was stated by the Supreme Court in *Bia Tosha Distributors Limited v Kenya Breweries Limited in Petition No. 15 OF 2020* when the Court stated:

It is worthy of note that the way the dispute is prosecuted through litigation and the surrounding issues determine whether indeed it qualifies to be considered as a constitutional question or not. It is readily determinable for some of them and almost improbable to distinguish constitutional and other underlying issues in others. It is therefore best left to the court on a case to case basis upon critically evaluating the facts, evidence and arguments before it. There will be a level of factual contestations that will inform the court's determination even at an interim stage to determine whether or not the court should exercise its discretion in favour of the applicant seeking conservatory orders.
19. In the instant case, the Petitioner has alleged violation of certain constitutional rights that cannot be resolved in a normal claim under section the *Employment Act*. Specifically, the Petitioner alleged violation of his right to freedom and security under Article 29(a), violation of the right of an accused person under Article 49(1)(a) and (e) and the right of an accused person to fair trial under Article 50(2). These are violations that cannot be addressed under an ordinary claim.
20. The issue whether the violations are proved or not are not determinants of whether or not there is a valid constitutional claim.
21. This issue was addressed in this court's ruling delivered on 25th May 2022 where the court dismissed the preliminary objection filed by the Respondent on the same grounds.

Whether there are any constitutional violations by the Respondent

22. The second issue is whether the Claimant proved any constitutional violations. It is common ground that the Respondent made a report to the police upon which the Claimant was arrested and incarcerated at Industrial Area Police Station where he was kept overnight and released the following



- day without being charged with any offence. According to the Claimant his arrest was not even entered in the Occurrence Book at the Police Station as the Respondent did not send any of its officers to formally lodge a complaint.
23. The Respondent did not dispute the fact that the Claimant was released without his arrest being entered into the OB at the Police Station.
 24. The Petitioner avers that the Respondent violated his rights under Articles 27(1) arguing that he was singled out for laying off through a scheme of arrest for an offense of being in possession of unspecified company property, incarceration and termination of employment. The Petitioner further avers that his rights under Article 28 were violated when he was publicly accosted from the Respondent's premises to the streets all the way to the police station and subjected to ignominy by having his phones confiscated without lawful justification. That the timing of his seizure from his workplace and frog marching him in the streets was calculated to demean his person and standing in society.
 25. The Petitioner further alleges violation of his rights under Article 29(a) by being deprived of his freedom arbitrarily and without just cause, violation of his rights under Article 41(1) by treating him unfairly, violation of his rights under Article 49(1)(a)(i)(e) by arresting him without promptly informing him in a language he understands of the reason for his arrest and violation of his rights under Article 50(2) for matters that should have been processed under the Respondent's internal disciplinary process.
 26. Articles 27(1) provides for equal protection and benefit of the law. The Petitioner did not demonstrate how his right to equal protection of the law was violated by the Respondent.
 27. Article 29(a) provides for the right to freedom and security of persons and specifically protects the right not to be deprived of freedom arbitrarily or without just cause, protection from detention without trial and from any form of violence from either public or private sources. The article further provides for protection against torture of any manner, whether physical or psychological.
 28. The fact that the Petitioner was arrested and incarcerated for 24 hours and thereafter released without being charged or his arrest being entered in the OB is proof that the arrest was without just cause and therefore arbitrary. It can only mean that the Respondent's motive for causing the arrest of the Petitioner was malicious. That the Respondent used the police to punish the Petitioner.
 29. I find that the Respondent violated the Petitioner's right to freedom and security under Article 29(a).
 30. Article 41(1) provides for the right to fair labour practices. The term fair labour practices is not defined in either *the Constitution* or the *Employment Act*. In my view fair labour practice refers to the manner in which an employer consistently treats employees at the workplace rather than a one-off incident like in the instant case. The Petitioner did not refer to any prior consistent unfair treatment at the workplace such as poor terms and conditions of service. I therefore do not find the reporting of the Petitioner to the police and his incarceration by itself to constitute unfair labour practice.
 31. Article 50(2) provides for the rights of accused persons. This is a right that can only be violated by the authorities which are obligated to arrest. In the Petitioner's case this violation was committed by the police who incarcerated him and not the Respondent. It was the police who had a duty to ensure the Petitioner's rights while he was in their custody.
 32. 49(1)(a)(i)(e) provide that:
 - (1) An arrested person has the right—
 - (a) to be informed promptly, in language that the person understands, of—



- (i) the reason for the arrest;
 - (ii) the right to remain silent; and
 - (iii) the consequences of not remaining silent;
- (b) ...;
 - (c) ...;
 - (d) ...;
 - (e) to be held separately from persons who are serving a sentence;
 - (f)
33. Like in the case of Article 50 above, the duty bearer in respect of this Article is the arresting person, in this case, the police station. The Respondent apart from causing the arrest of the Petitioner, cannot be blamed about the manner in which the Petitioner was treated while in the custody of the police officers who have not been joined in this petition.

Whether there was unlawful and unfair termination of employment of the Petitioner

34. The Petitioner submitted that fair labour practice in modern day employer-employee relationships cannot be gainsaid. That an employer is not curtailed in proceeding with administrative process while a criminal process is pending. The Petitioner further submitted there where an employer elects to make a complaint to the police and the employee is charged it is advisable for the employer to wait for the criminal process to process and in the meantime suspend or interdict the employee. That the employer failed to this in the instant case.
35. The Petitioner submitted that on 17th October, 2018 while the Petitioner was still at his work station namely the Respondent's garage, he was arrested by the police who frog marched him in the presence of his colleagues and incarcerated that he was accused of having been found in possession of company property which he had not surrendered to the warehouse for safe custody. It was the Petitioner's submission that the property in question were motor vehicle parts that he dealt with on daily basis. That the inventory annexed to the Respondent's replying affidavit was never availed to him to verify and sign.
36. It is the averment of the Petitioner that no complaint was ever made against him. That no criminal charges were preferred against him. It was the Petitioner's case that the arrest and subsequent dismissal was actuated by malice.
37. He submits that he was never subjected to a hearing. Relying on the decisions in *Benta A Khayo V Margaret Nderitu T/a Olive Gardens Elrc Cause No. 1025 Of 2012*; *John Rioba Mugo V Railey Security Services Limited [2016] Eklr*; *David Wanjau Muhoro V Ol Pajeta Ranching Limited [2014] eKLR*, the Petitioner submitted that the termination of his employment was unfair.
38. The Petitioner further submitted that the Respondent failed to comply with section 43 of the *Employment Act* on evidentiary burden.
39. For the Respondent it was submitted that the termination of the Petitioner's employment was for valid reason and complied with section 44 of the *Employment Act*. The Respondent further submitted that it paid the Petitioner his full terminal dues pending investigations. It is further submitted that the Respondent good cause to terminate the Petitioner's employment for gross misconduct. In support



of the assertion the Respondent relied on the decision in Kenya Power & Lighting Company Limited V Aggrey Lukoritwasike [2017] where the court stated-

“Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he "genuinely believed to exist," causing him to terminate the employee's services. In the present case, it seems quite clear from the evidence on record that KPLC believed, and had ample and reasonable basis for so believing, that Wasike had attempted to steal cable wire from KPLC stores which he was in charge of. ...”

40. Termination of employment is governed by sections 41, 43 and 45 of the [Employment Act](#). Section 41 provides for the procedure as follows-
 41. Notification and hearing before termination on grounds of misconduct
 - (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
41. Section 43 provides for proof of grounds for termination as follows-
 43. Proof of reason for termination
 - (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
42. Section 45 provides that where an employer fails to prove both fair procedure and valid reason for termination the termination shall be deemed unfair.
43. The Respondent in the instant case did not make any reference to a disciplinary hearing in the manner provided in section 41. The Respondent only referred to section 44 which sets out what would constitute gross misconduct to justify dismissal. Section 41 is explicit that before summarily dismissing an employee under section 44 the employer must comply with section 41. The wording of section 41 is in mandatory terms.
44. There having been no hearing or proof of the averments of the Respondent that were cited as the reason for termination of the employment of the Claimant, I find the termination of employment of the Claimant unfair under section 45(2) of the [Employment Act](#).



Remedies

45. Having found that the Respondent violated the rights of the Petitioner under Article 29(a) and that the Petitioner's employment was unfairly terminated, I make the following orders:
- a. A declaration be and is hereby made that the termination of the Petitioner's employment was unfair and unlawful;
 - b. A declaration be and is hereby made that the letter of termination of employment dated 23.10.2018 from the Respondent purporting to terminate the Petitioner's employment is unconstitutional, illegal, unlawful.
 - c. A declaration be and is hereby made that the Petitioner's termination was illegal;
 - d. A declaration be and is hereby made that the Respondent's action of calling in the police to seize and detain the Petitioner up to the time of his release violated his constitutional rights as set out under article 29(a) of *the Constitution*;
 - e. A declaration be and is hereby made that the Petitioner be compensated a total sum of Kshs. 500,000 by the Respondent for violation of the Petitioner's rights and fundamental freedoms under articles 29(a) of *the Constitution*;
 - f. An order be and is hereby made compelling the Respondent to compensate the Petitioner for unfair termination at the rate of 6 months salary being Kshs.45,000 × 6 months = Kshs.270,000/=
 - g. Interest on prayers (e) and (f) at court rates till payment in full
 - h. Costs of this petition

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 8TH DAY OF MAY, 2024

MAUREEN ONYANGO

JUDGE

