



REPUBLIC OF KENYA



**Legal Advice Centre t/a Kituo Cha Sheria & 13 others v Cabinet Secretary,
Ministry of Labour & Social Protection & 7 others; Commission on Administration
on Justice & 2 others (Interested Parties) (Employment and Labour Relations
Petition E038 of 2023) [2024] KEELRC 1375 (KLR) (6 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1375 (KLR)

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E038 OF 2023**

MN NDUMA, J

JUNE 6, 2024

BETWEEN

LEGAL ADVICE CENTRE T/A KITUO CHA SHERIA 1ST PETITIONER
HAKI JAMII RIGHTS CENTRE 2ND PETITIONER
JOHN NG'ANG'A MUIGAI 3RD PETITIONER
FEITH MURUNGA SHIMILA 4TH PETITIONER
EUNICE WANGUI NJENGA 5TH PETITIONER
CELESTINE MUSAVAKWA 6TH PETITIONER
PAULINE MUTHONI KARIUKI 7TH PETITIONER
MEDIA TRICKS KHASANDI 8TH PETITIONER
LUCY WAIRIMU NG'ANG'A 9TH PETITIONER
HANNAH NJERI NGUGI 10TH PETITIONER
BRENDA ANYANGO 11TH PETITIONER
JANE WANJIKU KAGIMBI 12TH PETITIONER
CATHERINE MUTURI 13TH PETITIONER
PURITY MBOGO 14TH PETITIONER

AND

**THE CABINET SECRETARY, MINISTRY OF LABOUR & SOCIAL
PROTECTION 1ST RESPONDENT**
KENYA NATIONAL EMPLOYMENT AUTHORITY 2ND RESPONDENT



THE CABINET SECRETARY, MINISTRY OF FOREIGN AFFAIRS	3RD RESPONDENT
DIRECTORATE OF IMMIGRATION & REGISTRATION OF PERSONS	4TH RESPONDENT
THE NATIONAL INDUSTRIAL TRAINING AUTHORITY (NITA)	5TH RESPONDENT
THE SPEAKER NATIONAL ASSEMBLY	6TH RESPONDENT
THE SPEAKER SENATE	7TH RESPONDENT
THE ATTORNEY GENERAL	8TH RESPONDENT

AND

COMMISSION ON ADMINISTRATION ON JUSTICE	INTERESTED PARTY
THE ASSOCIATION OF SKILLED MIGRANT AGENCIES IN KENYA	INTERESTED PARTY
KENYA ASSOCIATION OF PRIVATE EMPLOYMENT AGENCIES	INTERESTED PARTY

RULING

1. The petition is opposed vide a notice of preliminary objection by the Attorney General and other respondents couched as follows:-
 - a. The court lacks jurisdiction to hear and determine the petition or the dispute does not fall under the ambit of Article 162(2) (a) of *the Constitution* and Section 12 of the *Employment and Labour Relations Court Act*, No. 20 of 2011.
 - b. That the germane issues raised in the petition fall under the ambit of Article 165(3) (b) of *the Constitution*.
 - c. That the suit is frivolous vexatious and an abuse of the court process.
 - d. That the suit be struck out with costs.

2. The gravamen of the petition is the documented violation of human rights of migrant – domestic and other workers in the Middle East countries which include Bahrain; Bangladesh; Iraqi; Jordan; Kuwait; Saudi Arabia and United Arab Emirates among others. That these violations have been widely aired in Kenyan and International media. That the violations are further captured by individual narratives by the petitioners, victims and families of victims of violation of human and labour rights in the Middle East which violations include:
 - a. Physical psychological and sexual abuse
 - b. Trafficking, confiscation of travel documents by agencies and employers
 - c. Confiscation of mobile phones and communication restriction
 - d. Withholding of salaries



- e. Contract substitution/violation of terms of employment replacing agreed pacts with harsh conditions
 - f. Food and sleep deprivation
 - g. Rape
 - h. Forced suicide
 - i. Slavery and servitude
 - j. Murder and
 - k. Imprisonment prior to deportation over cooked up charges among others.
3. That the report in 2019 by the Parliamentary Committee on Labour and Social Welfare found that close to 55,000 Kenyans are working in Saudi Arabia alone which number had increased to 97,000 as at September 2022 as reported in the local media.
 4. That the rise in unemployment and under employment in Kenya has led to many Kenyans seeking greener pastures and an estimated 30,000 Kenyans migrate to the Middle East to work each year.
 5. That most of the workers are recruited and shipped to their work stations through local and foreign private employment agencies based in Kenya and Middle East.
 6. That the Agencies deceptively lure these job seekers with “high pay” promises in the Middle East where the job seekers are abandoned on low quality jobs and abusive employers where some end up dead in unclear circumstances others sexually abused, tortured, in prison, deported or missing.
 7. That in acknowledgment of the outcry on the poor working conditions, harassment, mistreatment and even mysterious deaths, and disappearance of Kenyan migrant workers in foreign countries, especially and in regard to migrant workers in the Middle East Region, the 1st respondent in acknowledging the scope and severity of the abuse imposed a ban on recruitment of Kenyans to work in those regions from September 2014. Similarly in November 2014, the 1st respondent revoked all accreditation license to private employment agencies.
 8. The ban was however lifted in 2016 and thereafter the cases of abuse and death have escalated with families calling on the government for assistance on behalf of distressed families.
 9. That on 25/5/2017, Hon. Phylis Kandie, then a Cabinet Secretary, Ministry of East African Affairs, Commerce and Tourism signed a bilateral agreement (BLA) between Republic of Kenya and the Kingdom of Saudi Arabia and United Arab Emirates. However, despite the BLA no adequate protection has been offered to the migrant workers.
 10. On 22nd July 2021 the Ministry of Labour officials appeared before parliament surrounding the death of one Melvin Kang'ere who died in Saudi Arabian Prison where she was detained for allegedly threatening to kill her employer reveals that Kenya recorded 93 deaths and 1,908 distress calls between 2019 and 2021 from Kenyans working in the Middle East which report has prompted fresh calls for travel ban.
 11. As a result of the abuse, the petitioners allege, the state violated their rights to freedom and freedom from slavery and servitude in allowing interalia, young unsuspecting Kenyan workers to be sent to the Middle East where they are trapped to servitude under the Kafala System (without adequate protection from the state) knowing too well that it is a system that the special rapporteur on human rights of migrants and human rights bodies have recommended for its abolishment amongst a myriad of



documented atrocities set out under paragraphs f(1) (a), (2) (a) to (g) 3(a) to (d); 4(a) to (j); 5(a) to (f); 6(a) to (j) and 7(a) to (d).

12. That the respondents have violated Articles 10, 21, 25,26, 27(1); 28, 29, 30, 35 and 41 of the Constitution of Kenya 2010. That the respondents have violated sections 83, 84, 85, 86 of the Employment Act; 2007, under which is legislated necessary steps to be observed in procurement of a foreign contract of service and in particular section 83 provides:-

“A foreign contract of service shall be in the prescribed form, signed by the parties thereto and shall be enlisted by a labour officer.”

13. That under section 84, a labour officer shall not attest to a foreign contract of service unless the officer is satisfied that the employee has consented to the contract; that it has not been procured through fraud, coercion, undue influence, any mistake or misrepresentation which might have induced the employee to enter into the contract; that the contract is in the prescribed form; the provisions of the contract comply with the Act, and have been understood by the employee and that the employee is medically fit to perform duties under the contract during the term of the said contract.
14. That under section 85, the labour officer is enjoined to require a foreign employer to provide security by bond in the prescribed form, with one or more sureties resident in Kenya and approved by the labour officer for the due performance of the contract in such sums as the labour officer considers reasonable.
15. That when there is a local agent in Kenya procuring foreign employment, the Cabinet Secretary may require that the security bond specified under section 85 (1) be given by the agent and the agent shall be personally bound by the terms of the bond notwithstanding the disclosure of the principal.
16. Finally, section 86, makes it an offence for a person to induce another to proceed abroad under informal contract to work and such a person if found guilty of the offence and convicted is liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months or to both.
17. Further legislation regulates procurement of Kenyans to work abroad is found under the labour institutions (private Employment Agencies) Regulation 2016 and under regulation 18 is provided that a foreign contract of employment shall specify the party responsible for payment of their:
- i. Visa fee
 - ii. Air fare and
 - iii. Medical examination
- provided that reasonable administrative costs may be charged by the agent in respect of trade test, occupational test, and administrative fees, which amounts should not exceed the job seekers proposed one-month salary.
18. Reliefs sought in the petition are as follows:-
1. A declaration that the petitioners and victims of Middle East abuses were and are entitled to effective protection by the state against modern day slavery, human trafficking, violence, physical injury, threats, deportation, rape, death and other human rights violations and the state failed/neglected and has abdicated on its responsibility.
 2. A declaration that the respondents failures and omissions of the state as particularized under paragraph f(1-7) have violated the petitioners' legitimate expectation of state's accountability,



right to life and freedom from torture, right to and freedom from slavery and servitude, human dignity, right to information and right to fair labour practices as enshrined under Articles 10, 26(1), 28 and 29(c), (d), (e), (f), 30, 35 and 41 of *the Constitution* of Kenya 2010 and Articles 3, 4, 5, 9, 15 and 17 of the African Charter on Human and People's Rights and Articles 1, 2, 3, 4, 5, 23 and 24 of the Universal Declaration of Human Rights.

3. An order for the IMMEDIATE cessation/suspension of labour migration to the Middle East until the state demonstrates that the basic minimums as set out under paragraph 84 of the petition (petitioners' case section) have been met.
4. An order do issue for fresh vetting of all local employment recruitment agencies with immediate effect.
5. An order do issue compelling the respondents to evacuate or repatriate any migrant worker stuck and in distress in the Middle East abusive employment, deportation centers and accommodation centers with immediate effect.
6. An order compelling the 1st respondent to table a formal report on the cause of death of the late Lucy Wambui Ng'ang'a and all those who have died under unclear circumstances in the Middle East within (3) months of the court's judgment.
7. An order for the repatriation of the body of the late Lucy Wambui Ng'ang'a for a dignified burial at the state expense and a status report be provided within three (3) months of the court's judgment.
8. An order directed at the Attorney General, the Ministry of Foreign Affairs and Ministry of Labour to initiate the process of ratifying:
 - a. The Private Employment Agencies Convention, 1997
 - b. ILO Domestic Workers Convention 2011 (No. 189); the Employment Policy Convention, 1964
 - c. The International Migrant Convention on the Protection of the Rights of all migrant Workers and Members of their Families, 1990 in accordance with section 7 of the *Treaty Making and Ratification Act* and a status report be filed before this honourable court within 3 months of the court judgment.
9. An order do issue suspending the travel of Migrant Workers to the Middle East until Saudi Arabia ratifies C097 Migration for Employment Convention (Revised) 1949 and C143 Migrant Workers (Supplementary Provisions Convention 1975).
10. An order for the cessation/suspension of labour migration to the Middle East countries that lack consulate and embassy presence, lack labour offices and safe houses.
11. An order directed at the state to ensure establishment of labour offices, consulate and embassy presence and safe houses in all Middle East Labour destination countries accessible to any Kenyan in distress and a status report be presented to this honourable court within one (1) year of the court's judgment.
12. An order directed at the state particularly the 1st respondent to fast-track the review of the Bilateral Agreements in place to cover the identified gaps and emerging issues and specifically to renegotiate the terms in the agreements and a status report to be presented to this honourable court within six (6) months of the court judgment.



13. An order directed at the state particularly the 1st respondent to fast-track the development and adoption of Bilateral Agreements with the Middle East countries where such agreements have not been developed and adopted and a status report be presented before the honourable court within six (6) months of the court judgment.
14. An order directed at the state particularly the 1st respondent to ensure full implementation of all BLAs with all Middle East countries and a status report be presented before this honourable court within one (1) year of the court judgment.
15. A declaration that the failure to enact the Labour Migration Management Bill and a comprehensive and harmonized labour migration policy that oversees labour exportation has increased the vulnerability of Kenyan migrant workers to abuse and human rights violations.
16. An order that in view of the above foregoing, the judgment of this honourable court be transmitted to the offices of the Attorney General, the Clerk of the National Assembly and the Clerk of the Senate for proposed law reforms for the purposes of enacting the Labour Migration Management Bill.
17. An order that in view of the above foregoing, the judgment of this honourable court be transmitted to the offices of the Attorney General for the purposes of enacting a comprehensive and harmonized labour migration policy.
18. An order directed at the state, particularly 1st respondent, to present a status report of its efforts to increase public awareness and education and to address the gaps in the Curriculum of Homecare Management within six (6) months of the court's judgment.
19. An order directed at the state particularly the 1st respondent to establish programmes that assist in rehabilitation and reintegration of victims and returnees and a status report be presented before the Honourable Court within six (6) months of the court judgment.
20. An order directed at the state to provide to the honourable court a status of all Kenyan migrant workers number and location of Kenyans abroad and conditions of employment abroad, those in prison facilities and deportation centers, their places of work, current and former migrant workers in distress and struck and those who have died in the Middle East countries within three (3) months of the court's judgment.
21. An order directing the 1st respondent to cater for travel expenses for the prospective migrant workers to avoid exploitation by their Middle East employers through the Kafala system.
22. An order do issue compelling the state to ensure that all identity and travel documents confiscated from the petitioners are returned to the petitioners and this to include issuing the 3rd respondent with a death certificate and regularizing any official documentation due to the petitioners.
23. An order do issue for the state to meet any medical and psychosocial costs incurred by the petitioners as a result of the death and abuses in the Middle East.
24. An order for provision of support for the children of the petitioners' particularly the late Lucy Wambui Ng'ang'a until they attain the age of majority at the state's expense.
25. A declaration that as a result of the breach of the rights enumerated above, the petitioners' suffered physical, mental and psychological trauma, loss, pain, special and general damages for which they are entitled to compensation.



26. An order do issue compelling the respondents jointly and severally to compensate the petitioners' as enshrined and provided for under Article 23(e) of the Constitution made up of special damages for the expenses incurred as well as general damages for pain and suffering, mental anguish, psychological trauma, loss of lives and exemplary damages pursuant to the declaration above for the petitioners'.
27. This being a matter of public interest there be no orders as to costs.
19. The objectors submit that the issues that fall for determination in this petition are not matters that may be heard and determined by this court whose jurisdiction is limited and well defined under Article 162(2) (a) as read with section 12(1) of the Employment Act, 2014 which provides: -
1. The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—
 - (a) disputes relating to or arising out of employment between an employer and an employee;
 - (b) disputes between an employer and a trade union;
 - (c) disputes between an employers' organisation and a trade union's organisation;
 - (d) disputes between trade unions;
 - (e) disputes between employer organisations;
 - (f) disputes between an employers' organisation and a trade union;
 - (g) disputes between a trade union and a member thereof;
 - (h) disputes between an employer's organisation or a federation and a member thereof;
 - (i) disputes concerning the registration and election of trade union officials; and
 - (j) disputes relating to the registration and enforcement of collective agreements.
20. The court was referred to the Supreme Court decision in Samuel Kamau Macharia versus Kenya Commercial Bank and 2 others [2011] eKLR where the court stated:-
- "A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law and cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law"
21. The objectors refer to Article 165(3)(b) of the Constitution which clothes the High Court with jurisdiction as follows:
- "Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened"



22. The objectors submit that the Employment and Labour Relations Court lacks jurisdiction to hear and determine this matter. They refer the court to the Supreme Court decision in Republic versus Karisa Chengo and 2 others [2017] eKLR where the court held:
- "The three are different and autonomous courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court. (Emphasis ours)."
23. The court is also referred to the Court of Appeal decision in National Society Security Fund Board of Trustee versus Kenya Tea Growers Association and 14 others Civil Appeal 656 of 2022 [2022] KECA 80 (KLR) which decision has since been reversed by the Supreme Court.
24. The petitioners' have provided the Supreme Court decision in Kenya Tea Growers Association and 2 others and The National Social Security Fund Board of Trustees and 13 others Petition E004 of 2023 as consolidated with Petition No. E002 of 2023 in which the Supreme Court has authoritatively defined the jurisdiction of this court citing with approval the High Court decision per Majanja J. in United States International University (USIU) versus Attorney General, High Court Petition No. 17 of 2012 [2012] Eklr.
25. The court also notes that the USIU case had been earlier cited with approval by the Court of Appeal in the case of Professor Mugendi versus Kenyatta University and others.
26. The Supreme Court rendered itself thus on the jurisdiction of this court.
- "[79] in our view there is nothing in *the Constitution*, the ELRC Act, or indeed in our decision in Karisa Chengo case to suggest that in exercising its jurisdiction over disputes that emanate 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 the particular issues. Otherwise, how else would it comprehensively and with finality determine such a dispute ?" Stripping the court of such authority would leave it jurisdictionally hum-strung; 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)"
27. Upon a careful consideration of the pleadings not yet placed in any dispute in this matter within the meaning of the decision in the Mukisa Biscuit case (supra), I could not think of a more suited case with multifarious statutory and constitutional issues arising for determination by this court since all and sundry relate to employment and labour relations in local and international sphere.
28. The objections raised by the respondents are misconceived, lack merit and are dismissed. The petition to proceed on its merit before the ELRC as filed.

DATED AT NAIROBI THIS 6TH DAY OF JUNE, 2024.



Mathews Nderi Nduma

JUDGE

Appearance:

Mr. Odukenya for Attorney General and 1st to 5th respondent

Ms. Mwaura for 7th respondent

Ms. Musembi for 1st Interested Party

Ms. Karwitha with John and Kimani for petitioners

Mr. Nyangi for 6th respondent

Mr. Kemboi, Court Assistant

