



**Orwa v Autocheck Ltd Also t/a Cheki (K) Ltd also t/a Get Gari (Gari Angalia)
(Petition E155 of 2023) [2024] KEELRC 1939 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1939 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E155 OF 2023**

B ONGAYA, J

JULY 26, 2024

**IN THE MATTER OF ARTICLES 2(1), 3(1), 10, 20, 23, 28, 30, 32, 33, 35, 41,
46, 47, 48, 50, 159, 258, 259 AND 260 OF CONSTITUTION OF KENYA.**

AND

**IN THE MATTER OF SECTIONS 2, 3, 4, 7 OF THE
FAIR ADMINISTRATIVE ACT NO. 4 OF 2015**

AND

**IN THE MATTER OF SECTIONS 2, 3, 5, 10, 12, 15, 16, 20, 31, 36,
41, 43, 44, 45, 39, 50 AND 51 OF THE EMPLOYMENT ACT 2007**

AND

**IN THE MATTER OF SECTIONS 2, 3, 4, 13, 14 AND 15 OF
THE CONSUMER PROTECTION ACT NO. 46 OF 2012**

BETWEEN

JACKSON OTIENO ORWA PETITIONER

AND

**AUTOCHECK LTD ALSO T/A CHEKI (K) LTD ALSO T/A GET GARI (GARI
ANGALIA) RESPONDENT**

JUDGMENT

1. The petitioner filed the petition dated 04.08.2023 through Mutuma Gichuru & Associates Advocates seeking the following orders:
 - i. A declaration be issued that the respondent had no valid justifiable reason to terminate employment of the petitioner.



- ii. Declaration be issued that the Respondent violated the petitioner's right to fair hearing.
 - iii. That the respondent violated the petitioner's right to fair labour practices by failing to pay him for his work as the acting country manager from 1st February to April at the rate equal to the substantive office holders' salary.
 - iv. That the petitioner's right against double jeopardy was violated.
 - v. That the petitioner's right to fair administrative action was violated.
 - vi. That the petitioner's right not to be subjected to slavery or servitude was violated by the respondent through the coercion and enticement to either resign voluntarily or be summarily dismissed.
 - vii. That the respondent do pay a sum of Kshs. 500,000.00 being payment in lieu of 2 months' notice.
 - viii. That the petitioner be paid a sum of Kshs. 3,000,000.00 being compensation for unfair termination of employment equivalent to 12 months' salary.
 - ix. The respondent do pay the petitioner a sum of Kshs. 337,000.00 being unpaid house allowance for 9 months.
 - x. That the respondent do pay to the petitioner a sum of Kshs. 2,401,182.00 being 3 ½ months' salary for acting as the respondent's country manager without commensurate pay.
 - xi. Payment of Kshs. 54,000.00 being equivalent of 9 days leave days not taken.
 - xii. That the petitioner be paid the sum of Kshs. 2,045,260.00 being the value of ESOP shares.
 - xiii. That the petitioner be paid the sum of Kshs. 562,500.00 being unpaid bonuses for quarters 4(2022), Q1 & 2(2023) appraisal.
 - xiv. That the petitioner be paid general damages for violation of his constitutional rights.
 - xv. That the respondent do pay the balance of the loan facility due.
 - xvi. That the respondent do pay the exemplary damages to the petitioner.
 - xvii. That the respondent do pay to the petitioner aggravated damages.
 - xviii. That the respondent do cater for or reimburse the petitioner the cost incurred in the petitioner's baby surgical operation.
 - xix. That the respondent do pay the petitioner damages for mental torture, anguish, etc.
 - xx. Interest at court rates on vii, viii, ix, x, xii from the date of filing this petition until pay in full.
 - xxi. Certificate of service.
 - xxii. Costs of this petition.
 - xxiii. Any further relief that this court will deem appropriate and just.
2. The petition was based upon the supporting affidavit of the petitioner and annexures thereto filed together with the petition and sworn on 03.08.2023. The petitioners' case is as follows:



- a. That he was head hunted, interviewed and employed by the respondent as its commercial manager where he could report to the respondent's country manager who was his line manager and supervisor. He attached his contract.
- b. That he earned a gross monthly salary of Kshs. 250,000/= and that he was never paid any house allowance and the same was not provided for in the payslip.
- c. That even though the respondent is a body corporate in Kenya, its parent company – VEE 8 International Holdings Inc- is situated in Delaware, U.S.A and its financial status is unknown. The respondent also operates in the name and style of Get Gari which trade name is registered as such.
- d. That on or about 01.02.2023 to 15.05.2023 he was appointed as the respondent's C.E.O (Etop Ikpe) as the acting country manager, Kenya where he simultaneously carried out both responsibilities. This was because the then country manager was on maternity leave.
- e. That having worked as such, upon review of performance he was entitled to a sum total of Ksh. 562,500/- as bonuses but same has never been paid to date.
- f. That all was well until he was accused of drunkenness, intoxication while at work and of sexually harassing or assaulting, some employees in which subsequent investigations found him innocent.
- g. That on 15.05.2023 he took paternity leave in which a stand in was appointed but on 26.05.2023 he received a diary/calendar notification inviting him for a meeting scheduled on 29.05.2023 whose agenda was not indicated. He responded he was unavailable.
- h. That on the said date he was served with a further invitation for 31.05.2023 in which he met with some colleagues and management staff where he was served with a notice to show cause for a missing engine block for motor vehicle KCE 545W in which he was allegedly responsible. He was also informed of his indefinite suspension from work until a decision is reached.
- i. That particularly he was accused of;
 - i. Failing to carry out proper supervisory role in the repair of motor vehicle number KCE 545W, which allegedly had visible silicon seals on the fitted slim engine.
 - ii. Preventing the business from getting a good offer on the car (KCE 545W) as the owner opted out due to disappointment.
 - iii. Lack of integrity due to several counts of discrepancies hence loss of revenue to the respondent.
 - iv. Orchestrating the loss or disappearance of motor vehicle number KCE 545W engine block after its repair by the petitioner's own machine.
- j. That he responded to each of the allegation vide a letter dated 02.06.2023 addressed to the respondent's global senior vice president.
- k. That on 05.06.2023 after delivering a hard copy of the response he was served with an invitation letter to a disciplinary hearing. He attended and met with some colleagues and group head of legal on 06.06.2023 where, an investigation report dated 05.06.2023 was read out and presented. His case is that had never been served with the said report.



- l. That according to the report, it was their finding that the petitioner was guilty of the charges spelt out in the notice to show cause and he was then served with a further notice to show cause and come back with a witness at 5. 00 p.m of the same day.
 - m. That a decision was later made to have further investigations conducted which would inform a verdict.
 - n. That on 09.06.2023 he received a letter inviting him for a disciplinary hearing scheduled for 12.06.2023 in which he appeared and was informed that they had reached a verdict to terminate him from employment in which he was then served with a notice of summary dismissal dated 12.06.2023.
 - o. That he was not served with the necessary material that informed the decision to terminate him.
 - p. That he was offered to issue a resignation letter in order to earn him a favourable recommendation letter where he asked for more time to consider the offer but which time was denied.
 - q. That he was treated with contempt and against the principles of natural justice.
 - r. That he was not compensated for 3 ½ months as Country Manager and was not given a chance to apply for the said position.
 - s. That his loan facility with the respondent as a staff was converted into a commercial retail loan making the interest rise from 15% p.a to 25% p.a and that the respondent is not licensed to issue loans.
 - t. That he no longer has a medical cover after the dismissal despite having medical emergencies, which has left him in anguish.
3. The respondent filed a notice of preliminary objection together with a replying affidavit through O & M LLP both dated 02.05.2024. The Regional Compliance Manager of the respondent swore the opposing affidavit. The preliminary objection was on the following grounds:
- a. This Honourable Court lacks jurisdiction to determine the petition as it does not meet the threshold of a constitutional petition as the reliefs being sought can be remedied under a normal employment cause or suit brought by a statement of claim under rules 4(1) and 7(3) of the *Employment and Labour Relations (Procedure) Rules*, 2016.
 - b. The Honourable Court lacks jurisdiction to entertain this Petition by virtue of Section 10 of the *Arbitration Act*, 1995 and the Arbitration Clause stipulated in the employment agreement between the petitioner and the respondent that directs parties to determine disputes by way of Arbitration.
 - c. The instant petition is frivolous, vexatious and an abuse of the court process and it is only fair, just and proper that the Court strikes it out with costs.
4. In the replying affidavit the respondent denied the allegations as stated by the petitioner and its case is as follows:
- a. That the person that appointed the petitioner, as the acting Country Manager, did not have authority to do so and therefore the petitioner is not entitled to any compensation for that position.



- b. That the respondent followed due procedure as required under the *Employment Act* before summarily dismissing the petitioner as per the letter and notices issued and mentioned by the petitioner.
 - c. That the petitioner was granted a fair hearing and offered final dues following his dismissal which he declined to accept receipt.
 - d. That the audio recordings relied upon and attached by the petitioner are inadmissible and a violation and breach of privacy on the part of the respondent.
 - e. That from the loan agreement entered into by the petitioner and the employee, the interest then was by virtue of being an employee and that upon termination of employment same would automatically be converted into a commercial loan attracting commercial loan interest rates at 25% per annum.
 - f. They reiterated the issues as is in the preliminary objection and urged that the petition herein be dismissed with costs.
5. The parties filed final submissions. The Court has considered all the material on record. The Court returns as follows:
- a. The preliminary objection must succeed. The claimant has not pleaded any constitutional violations. While seeking prayers purportedly about constitutional violation, the purported prayers about violation of the Bill of Rights are not based on particularised violation of rights and fundamental freedoms. The facts of the claims in the petition are that the contract of service was breached and the petitioner was unfairly terminated. The remedies sought would be available in an ordinary action by way of a memorandum of claim under the rules of the Court and as envisaged in the *Employment Act* and the *Employment and Labour Relations Court Act*. The preliminary objection will be upheld and the petition liable for striking out.
 - b. Further, the Court considers that the issues in dispute would require testing of evidence through taking of witness testimony. The petition as prosecuted based on affidavits would not achieve justice for the parties in absence of viva voce hearing of the parties.
 - c. As relates to the objection that parties agreed to take the dispute to arbitration, the clause would be a basis to stay the proceedings and not to strike out the proceedings as suggested for the respondent. In particular, section 15 (4) of the *Employment and Labour Relations Court Act* provides, “(4) If at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the Court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration.” That limb of the preliminary objection will collapse.

In conclusion, the petition is hereby struck out with costs upon the finding that the preliminary objection is upheld as the petition is trapped by the avoidance principle.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 26TH JULY 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

