

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
PETITION NO. E162 OF 2024

**IN THE MATTER OF THE CONTRAVENTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS IN ARTICLES 3, 10, 20,
21(1), 22, 23, 25, 27, 41(1), 47, 159, 258(1), 259(1) AND 260 OF
THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS) PRACTICE AND PROCEDURE RULES, 201**

AND

**IN THE MATTER OF CONTRAVENTION OF FAIR
ADMINISTRATIVE ACTION, 2015 (ACT NO 4 OF 2015)**

AND

**IN THE MATTER OF CONTRAVENTION OF THE
EMPLOYMENT ACT, 2007 (ACT NO 11 OF 2007) SECTIONS
5 (2)(3)(5)(7)(C)**

BETWEEN

KHADIJA GATIE CHUI.....PETITIONER

- VERSUS -

UMMA UNIVERSITY..... RESPONDENT

*(Before Hon. Justice Byram Ongaya on Wednesday 17th December,
2025)*

JUDGMENT

1. The petitioner filed the petition and affidavit in support of the petition dated 04.10.2025 through S & K Advocates LLP, praying for orders that:
 - i. A declaration that stopping the petitioner’s salary for 18 months was unlawful and violated her right to fair labour practices.
 - ii. A declaration that subjecting the petitioner to disciplinary process while pursuing her PHD programme and at the same time maintaining her colleague under similar circumstances violated the petitioner’s rights not to be discriminated against under Article 27 of the Constitution of Kenya.

- iii. A declaration that stopping the petitioner's salary without notice or justifiable reason for 18 months then subjecting her to disciplinary process amounted to Constructive termination of the petitioner.
- iv. A declaration that the respondent has violated the petitioner's right to legitimate expectation to complete her PHD programme and work for at least 3 years as per the bond terms.
- v. An order for compensation of special damages in form of salary withheld amounting to Kshs. 1,416,708.00 as at the date of filing the petition which sum shall keep increasing until full payment.
- vi. An order for maximum compensation for constructive termination amounting to Kshs. 944,472/=.
- vii. Compensation for leave days earned but not taken amounting Kshs. 393,530/= tabulated on a 5 year period.
- viii. A declaration that forwarding the petitioner's name to Metropol for listing in the CRB records was a violation of

the petitioner's right to privacy thus entitled to compensation of Kshs. 5,000,000/=.

- ix. An order for payment of 1 month salary in lieu of notice amounting to Kshs. 78,706/=.
- x. An order for payment of Kenya shillings Ten Million (Kshs. 10,000,000/=) or any other amount the court may deem appropriate as general damages for discrimination, violation of the petitioner's right to human dignity and self-worth, violation of the petitioner's right of fair labour practices, fair administrative action and freedom from servitude.
- xi. A permanent injunction restraining the respondent from withdrawing the scholarship recommendation at the Islamic University of Malaysia or victimizing or treating the petitioner unfairly on account of instituting this petition.
- xii. Costs of the petition.
- xiii. Interests on prayers (vi) and (vii) at courts rate till payment in full.

2. The petitioner's case was as follows:

- a. She was employed as a female warden on 01.10.2010 and promoted through the ranks up to the position of an assistant registrar. She discharged her duties until her constructive termination on 31.07.2024.
- b. She pursued her academic excellence at the respondent's institution, where she achieved a Bachelor's degree in Islamic Shariah. She then proceeded to Islamic University Uganda, where she graduated with a Master's degree in Islamic Shariah. She thereafter applied and was awarded a scholarship to pursue a PHD in International Islamic University Malaysia, whose degree was approved by the respondent.
- c. The PHD degree was for three years, and as a condition precedent to the scholarship, she was on 19.12.2019 bonded, where she committed to work for the respondent for at least three years upon completion of her studies in Malaysia. Upon obtaining admission to the university in Malaysia, she received communication on 09.01.2020 that the semester would commence in February 2020, which information was shared with the respondent, and there was no objection.

- d. She arrived in Malaysia for her PHD programme and was reminded that every international student needed to undertake an English Proficiency test before being admitted to the University. She was also informed that she was late for admission to the programme and had to register for the next intake for the English course, which she agreed to do and later passed her English proficiency exams. She was thereafter admitted to pursue her PHD programme in September 2020, seven months late as per the programme schedule, which information was within the respondent's knowledge.
- e. Shortly after starting her PHD programme, there was a 100% lockdown in Malaysia due to COVID-19. There were learning interruptions for close to one year, which interrupted all programmes, including hers, and effectively affected the academic period within which she was expected to complete her programme. When the lockdown was later lifted, she completed her coursework and commenced her thesis. However, her supervisor resigned and she had to apply for a

substitution, which request was granted, as revealed in the progress report.

- f. Further, in 2022, she was blessed with a baby in 2022 whose pregnancy had many medical complications that affected her programme. This was well reported and the respondent did not express any concern.
- g. She shared all relevant information regarding her progress, which information the respondent never objected to and/or raised any concern. However, she received a letter from the respondent dated 08.02.2023 asking her to report to work immediately or face disciplinary action. Her response referred to all correspondence earlier shared, including the progress report. She also informed the respondent that she was still pursuing her PHD programme, which had been affected by unforeseen events and that she would report upon such completion. She contended that there was no further communication from the respondent other than a unilateral decision to stop her salary with all attendant benefits.

- h. It was not until 26.07.2024 that she was invited for disciplinary proceedings slated for 05.08.2024. She resigned on 31.07.2024 with immediate effect because the outcome was known, considering the fate of two other colleagues who attended the same university under similar circumstances. In addition, the respondent acted with absolute mischief by refusing to share the revised editions of its statutes and HR Manual that had been requested in preparation for the disciplinary process, opting to share obsolete documents a day before her resignation.
- i. Her fundamental rights and freedoms under Articles 27, 28, 41 and 47 of the Constitution were badly violated, infringed and threatened such that, because the employment became intolerable, she opted to quit. She was entitled in those circumstances to leave instantly without giving any notice. Further, the termination of her employment was constructive on the basis that, as at the time of filing the instant petition, over 50 employees had resigned under duress and/or been unfairly terminated under different circumstances.

- j. The respondent's conduct constitutes a repudiatory breach of the fundamental terms of the contract, going to the root of the contract of employment to pay salary. There was therefore a causal link between the respondent's conduct and the reason for her terminating the contract due to non-payment of salary for 18 months. Notably, she has never accepted, waived, acquiesced or conducted herself in a manner that will estop her from asserting the repudiatory breach.
- k. In addition, she was a guardian for a student pursuing a degree course at the respondent's institution. She permitted the respondent to deduct from her Kshs. 5000/- every month towards the student's tuition fee payment. When her salary was stopped, she made a payment of Kshs. 50,000/- to cater for 10 months of the student's fees. She also applied for and was granted CDF funds towards the student's fees.
- l. Since the respondent was determined to maliciously frustrate her, it proceeded without notice and/or any legal basis to list her on CRB, as detailed in the petition.

3. The petitioner particularized the violation of the Constitution as follows:

- i) The demand that she abandons her PHD programme, which was affected by other unforeseen factors contrary to clause 1(a) and (b) of the Bond Agreement, shows that the respondent violated and has continued to violate her right to fair labour practices guaranteed under Article 41(1) of the Constitution. Further, the unlawful suspension of her salary has tampered with the facilitation of her studies and being unable to be physically present at her institution in Malaysia, there was an unexpected withdrawal of her scholarship and her monthly stipend with immediate effect.
- ii) The unilateral stoppage of her salary without notice and or hearing denied her fair remuneration, guaranteed under Article 41(2) (a), and violated Article 41(2)(b) of the Constitution, which guarantees every worker the right to reasonable working conditions by ensuring remuneration at the correct salary attributed to a position, but which has not happened in the petitioner's case for a period of 18 months of service.

iii) The respondent discriminated against her in violation of Article 27(1) and (2) of the Constitution, read with Section 5 of the Employment Act 2007, for treating her differently from the way it treated her fellow employee under similar circumstances, who, being in a good relationship with the Vice Chancellor, has been reinstated at her work place and has never been subjected to any disciplinary process.

iv) The respondent's unilateral decision to stop her salary for 18 months has denied her a respectful and dignified life, hence violating her right to human dignity and self-worth as protected under Article 28 of the Constitution. The respondent chose to punish her while she was pregnant by abruptly and without notice stopping the medical cover and suspending her salary without a fair hearing, which contravenes its own policy and the labour law.

4. The respondent filed its replying affidavit, sworn by Siana Amin on 24.04.2025, through Ali & Company Advocates. It was averred as hereunder:

- a. The petition is full of untruths, wilful misrepresentations and concealment of material facts meant for the petitioner to advance her unjust enrichment of monetary compensation.
- b. The petitioner applied for a three-year study leave on 17.12.2019, to run from January 2020 to December 2022. She hence created a legitimate expectation in the respondent that she would complete her studies within the prescribed period applied for. However, she extended the said leave until July 2024, when she ceremoniously, without notice, decided to resign from her employment after the respondent summoned her to show cause vide a letter dated 04.05.2024.
- c. Being that the petitioner's scholarship was funded by an external partner of the respondent, the respondent was not aware that she was not physically at her station of study until an email from the sponsor sent to the respondent's VC informed them that the petitioner had not been attending university in Malaysia for over one year, and that she had over three semesters remaining to complete her studies. Further, the email notified the VC that the sponsor would honour any

pending fees but would not pay any tuition fees accumulated during her absence from school, and that her scholarship had been stopped.

- d. The respondent did not discriminate against the petitioner as alleged. It was right to stop her salary, considering the expiry of her leave without extension and her failure to report to work thereafter. There was no constructive dismissal as her salary was stopped 18 months before the disciplinary process, and she opted to resign instead of explaining her situation. This Court should compel the petitioner to compensate the respondent for all the costs incurred because she violated the terms of engagement when she resigned without notice. The petitioner never earned any leave days as she was never at work for the entire time. The respondent did not report her to the CRB as alleged.
5. The petitioner filed a reply to the respondent's response to the petition dated 01.06.2025, asserting that all scholarships are advertised through the University, which floats the advert to those willing to apply and upon approval, the University issues a

recommendation. She contended that she applied for the extension of her study leave on 13.02.2023, but it was never responded to. She had health issues emanating from her two pregnancies suffered at the hands of the respondent, who had withdrawn her medical cover without notice.

6. The parties filed their written submissions in court. The Court has considered the material on record and returns as follows.
7. To answer the **1st issue** the Court returns that as pleaded for the parties, they were in a contract of service.
8. To answer the **2nd issue**, the respondent granted the petitioner a study leave terms of which were spelt out in the Study Leave and Training Bond Form signed by the parties on 17.12.2019 but the petitioner breached the terms thereof as will be found for the respondent. Clause 1 (b) of the Form provides that the petitioner was to devote her whole time to following the course of institution for which the approval was granted unless permission to undertake other work or studies or to modify her in content or duration was granted. Clause 1(c) was that she was not to engage in any activity that was considered detrimental to her progress in the study

prescribed for her or detrimental to her health. Clause 1 (d) was express thus, “d) To satisfy the University as to attendance, conduct and progress by a report from the head of the institution or such other approved person at the institution in which she is studying”. As submitted for the respondent the Court finds that the petitioner failed to report her study progress through the head of the institution or such other approved person at the institution in which she was enrolled. The petitioner has alleged how pre-English testing, delays in visa, COVID -19 situation and her pregnancy may have affected her study progression with the consequence that the period in the Study Leave and Training Bond Form was not sufficient to complete her studies in issue. However, she has not urged and shown that the head of the institution or such authorised person ever rendered a report on her behalf in that respect. The Court therefore finds for the respondent that the petitioner breached the condition of the study leave and bond agreement as found.

9. To answer the **3rd issue**, the respondent stopped the petitioner’s salary only after the study period had lapsed and the petitioner

failed to report back on duty. The study leave was from Jan 2022 to December 2022. Thereafter the respondent wrote the letter dated 08.02.2023. The letter notified the petitioner that her study leave for PhD programme had expired as at 31.12.2022 and she was required to report to the human resource department with immediate effect. The letter further stated thus, "...Your absence from duty can lead to termination as per Human Resource policy. Failure to report, the University has no option but to take necessary action against you with immediate effect...." The petitioner has not denied receipt of that letter but alleges that she replied explaining her predicaments by a letter which she says was dated 13.02.2023 but which when pressed in cross-examination, she had exhibited it but failed to deliver the same to the respondent. Thus, in cross examination the petitioner testified incredibly about the delivery thus, "On 08.02.2028 I had failed to seek extension of study leave. October 2022 I was required to give progress report. I had explained in response that I had been lagging behind. Is filed (witness gives no page number). It was scree-shot of e-mail. (no page given). After letter of 08.02.2023 the

respondent withheld further salaries. My salary had been paid as I studied. After letter of 08.02.2023 I send a letter to respondent explaining. It is dated 13.02.2023. I have evidence of delivery of the letter. I had forwarded it by email to HR. I explained why I had not reported to work but I had breached leave and bond – I deny I had not breached bond. I was within my study period....”The Court finds that on a balance of probability, the petitioner did not reply the respondent’s letter of 08.02.2023 by delivering her purported letter of 13.02.2023 because she filed no email she alleged she had used to forward to the respondent’s human resource department or office. The respondent had been magnanimous in paying the petitioner’s salary for January 2023 and the Court returns that having not heard from her upon lapsing of the study leave period, the respondent was entitled to stop the petitioner’s salary effective end of February, 2023. The respondent’s case is upheld in that respect. The submission for the petitioner that wages are cornerstone of a contract of employment but in the circumstance that the petitioner had breached the terms and conditions of the study leave and bond agreement and failed to

report back as had been agreed or to complete her studies on time free from a progress report to the respondent by the head of the institution she was attending, the petitioner thereby became disentitled to salary payments. The Court finds that the respondent was entitled to stop the salary payments to mitigate its losses in that respects. Nowhere has the petitioner shown that she sought and obtained an extension of her study leave period. It is not also true when it is submitted for the petitioner that the stoppage of salary was at a time the study leave period was validly running. It is submitted for the respondent that a fair process had not been followed to stop the salary and the right to fair administrative action was thereby violated. It is submitted for the respondent that upon failure to apply for extension of the study leave, the respondent had a valid opinion that the petitioner appears to have opted to desert and with no intention to ever come back as would be in a case of mere absconding or temporary absence with intention to resume duty and work as employed. The Court finds for the respondent because even when subsequently asked to explain her failure to report back and later to show cause, the

petitioner promptly opted to resign instead of explaining herself and raising all her grievances and predicaments she says she experience throughout the study period until she eventually graduated. The Court returns that the stoppage of salary in the circumstances was a fair mitigating factor for the respondent and was necessary to defeat the petitioner's otherwise unfair and unjust enrichment after she had breached the contract of service and the study leave and bond agreement.

10. To answer the **4th issue**, the Court returns that the contract of service between the parties lapsed upon the petitioner's resignation and the resignation did not amount to unfair constructive termination as purported for the petitioner. The respondent issued a a notice to show cause for absconding duty and non-reporting to work after study leave dated 24.05.2024 and which breached the University's Policy on Attendance and Leave; terms of the Study Leave Agreement; and, general employment agreement clauses regarding unauthorised absence. The letter further stated, "The above incident constitutes grounds for summary dismissal under the Employment Act 2007, Section 44 (a) "without leave or other

lawful cause, an employee absents him/herself from the place appointed for the performance of his/her work”. You are hereby required to show cause in writing within seven (7) days. From the date of this notice explaining the reasons for your absence and why disciplinary action, including possible termination of employment, should not be taken against you. Failure to provide satisfactory explanation within the stipulated time will result in further disciplinary actions, which may include termination of your employment. The written response should reach the undersigned latest by 30th May 2024 by 5.00pm. We urge you to treat the matter with the utmost seriousness and respond promptly.” The notice was signed by Dr.Halima Saado Abdillahi PhD, Vice Chancellor.

11.Instead of responding to the notice to show cause towards exculpation, the petitioner addressed to the Vice-Chancellor her letter of redesignation dated 31.07.2024 and stated as follows,
“I hereby tender my resignation in the position captioned above with immediate effect as of 31st July, 2024. Henceforth, I cease to be a bona fide employee of Umma University.

However, I am grateful for the great memories that have left an indelible mark in me throughout my profession.

All the same, as I progress further, I expect a smooth transition in my exit process by duly according my rights as an employee.

Moreover, I kindly request fair reimbursement of my salary as of February, 2023 up to July, 2024 in lump sum, together with the 3% deductible salary during the Corona pandemic that has already been disbursed to other employees. In addition to accumulated pension pool and gratuity and my certificate of service.

Thank you all for the opportunities and challenges that have reshaped me into a better personality.”

12. The respondent accepted the resignation by its letter dated 08.08.2024 and required the petitioner to clear with the respondent prior to receiving her terminal dues, if any, and her certificate of service. The acceptance of resignation letter further stated thus, “Kindly note that you did not work from February 2023 to July 2024 hence you are not entitled to any salary claim. However, considering that you resigned with immediate effect without giving the University a one-month notice as per the law, you are

required to pay the University one-month salary in lieu of such notice.”

13. The Court finds that the contract of service ended when the petitioner resigned and without giving the contractual one-month notice or paying the respondent in lieu thereof. The petitioner has not established that the respondent breached a fundamental term of the contract of service and constructive termination has not been established at all. Instead the evidence points that it was the petitioner who breached the terms and conditions of the study leave and bond agreement.

14. In **Greatlakes Trans [K] Limited v Mohammed (Employment and Labour Relations Appeal 147 of 2024)** **[2025] KEELRC 1166 (KLR) (24 April 2025) (Judgment)**
Neutral citation: [2025] KEELRC 1166 (KLR) Ocharo J stated as follows,

“34. The Court of Appeal in **Coca Cola East & Central Africa Limited v Maria Ligaga [2015] eKLR** summarised the factors for consideration in a constructive dismissal claim, thus:

- a) What were the fundamental or essential terms of the contract of employment?
- b) Is there a repudiatory breach of the fundamental terms of the contract through the conduct of the employer?
- c) The employer's conduct must be a fundamental or significant breach that goes to the root of the contract of employment or shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.
- d) An objective test is to be applied in evaluating the employer's conduct.
- e) There must be a causal link between the employer's conduct and the reason for the employee terminating the contract, i.e. causation must be proved.
- f) An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.
- g) The employer must not have accepted, waived, or acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must, within a reasonable

time, terminate the employment relationship pursuant to the breach.

h) The burden of proving the repudiatory breach or constructive dismissal is on the employee.

i) Facts giving rise to a repudiatory breach or constructive dismissal are varied.”

15. The Court has considered those factors and returns that the petitioner has failed to establish constructive termination in the instant case.

16. To answer the **5th issue**, the Court returns that the petitioner has failed to establish violation of the Bill of Rights as was pleaded and alleged. In particular the Court finds as follows:

a) It was urged and submitted for the petitioner that employees who had been on study leave beyond the agreed period in the study leave and bond agreement had not treated the way the respondent had treated and the same amounted to discrimination contrary to Article 27 of the Constitution. However, as submitted for the respondent,

the petitioner did not by evidence show that the circumstances of those other alleged employees were exactly similar to her situation in issue. As submitted, the petitioner has failed to offer any material evidence of her alleged differential treatment and evidence of a valid comparator that the alleged other persons were in circumstances like those of the petitioner in issue. Issues surrounding the petitioner's delays to start studies on time due to time taken to do the Pre-English test or Visa delays, impact of COVID 19, and the petitioner's pregnancy or medical status were all matters that were required to be reported to the respondent by the head of the institution the petitioner was attending and as impairing the agreed completion time. The Court has already found that such institutional report was not caused to be submitted to the respondent by the petitioner. By those findings the allegations of discrimination will collapse.

b) As submitted for the respondent, the petitioner has not shown the manner by which the respondent violated her

right to human dignity as provided for in the Bill of Rights.

c) By the findings made earlier in this judgment the Court returns that violations of Articles 27, 28,31, 41 and 47 of the Constitution have not been established. Instead, the Court returns that having heard the case and listened to the witnesses and considered the pleadings and submissions, the petition is essentially trapped with the constitutional avoidance doctrine because it has turned out that the petitioner's grievance was purely about the contract of service and the related study leave and bond agreement and nothing more. Such was a dispute that could be determined without the need to invoke the constitutional jurisdiction on enforcement of the Bill of Rights.

17. The **6th issue** is on remedies. The Court returns as follows:

a) The salary withheld for 18 months Kshs.1, 416, 708 is not justified in view that the Court has found that it was the petitioner who was in breach and the respondent was entitled to stop payment of salaries as a mitigating

measure. In any event, for reasons not attributable to the respondent, the petitioner failed to work throughout the claimed period and it would amount to unjust enrichment of the petitioner to order the respondent to pay as was claimed. The same applies to claims of leave earned and not taken or paid for in lieu thereof. In fact, the Court returns that in the circumstances of the case no leave as claimed was ever earned.

- b) The Court has found that no unfair constructive termination occurred or at all but that the petitioner resigned, and, no compensation can issue under section 49 of the Employment Act.
- c) The CRB listing was the natural consequence of the petitioner failing to pay the tuition fees for a student she was obligated to pay for. The claim in that respect is found unjustified.
- d) It is the petitioner who suddenly resigned and her claim for pay in lieu of one month termination notice is found most unjustified.

e) The Court has found that no right or fundamental freedom of the petitioner was threatened or violated as was alleged. Instead, it appears to the Court that after a lot of support by the respondent for the petitioner to attend the study, the petitioner turned out to be uncooperative within the terms and conditions of the study leave and bond agreement. The Court has taken judicial notice that during the COVID-19 situation, the respondent paid the petitioner and payment may have been withheld due to the lockdown protocols. While alleging that salaries for other staff were withheld then released, the petitioner has not offered useful evidence of the circumstances of her allegation. The Court returns that its not established that damages for violation of rights would be due in the circumstances of the case and the findings herein.

f) The respondent has significantly succeeded as against the petitioner. In resigning the petitioner said nothing about her obligations under the study leave and bond agreement under which, after the successful study, she was to serve

the respondent for agreed post study period or refund the paid salaries. She did not serve a termination notice or pay in lieu thereof. Instead she frustrated the initiated disciplinary process by which parties could have ironed out issues and may be arrive at a more just balance in the circumstance of the parties. In those considerations the petitioner will pay respondent's costs of the petition.

In conclusion the petition is hereby dismissed with costs for the respondent.

**Signed, dated and delivered by video-link and in court at Nairobi
this Wednesday 17th December, 2025.**

**BYRAM ONGAYA,
PRINCIPAL JUDGE**