



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwangi v Agence Francaise De Developpement (Petition E120 of 2025)  
[2025] KEELRC 3664 (KLR) (17 December 2025) (Ruling)**

Neutral citation: [2025] KEELRC 3664 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**PETITION E120 OF 2025**  
**B ONGAYA, J**  
**DECEMBER 17, 2025**  
**IN THE MATTER OF ARTICLES 22 (1) AND 162(2)**  
**(A) OF THE CONSTITUTION OF KENYA, 2010**  
**AND**  
**IN THE MATTER OF THE VIOLATION OF ARTICLES**  
**27, 28, 29,31,41,47 &50 OF THE CONSTITUTION**  
**AND**  
**IN THE MATTER OF VIOLATION OF SECTIONS 5, 10,17,30,41,45,**  
**&51 OF THE EMPLOYMENT ACT CAP.226 LAWS OF KENYA**  
**AND**  
**IN THE MATTER OF SECTION 6(1) OF THE OCCUPATIONAL**  
**SAFETY AND HEALTH ACT CAP 514 LAWS OF KENYA**  
**AND**  
**IN THE MATTER OF SECTIONS 2, 26 & 46 OF THE DATA**  
**PROTECTION ACT NO.24 OF 2019 LAWS OF KENYA**  
**AND**  
**IN THE MATTER OF THE FAIR ADMINISTRATIVE**  
**ACTION ACT, CAP 4 LAWS OF KENYA**  
**AND**  
**IN THE MATTER OF WORKPLACE HARRASSMENT,**  
**UNLAWFUL VARIATION OF EMPLOYMENT TERMS, UNFAIR**  
**LABOUR PRACTICES & UNFAIR ADMINISTRATIVE ACTION**  
**AND**  
**IN THE MATTER OF UNLAWFUL AND UNFAIR TERMINATION FROM EMPLOYMENT**



**BETWEEN**

**ANNE MWANGI ..... PETITIONER**

**AND**

**AGENCE FRANCAISE DE DEVELOPPEMENT ..... RESPONDENT**

**RULING**

1. The petitioner filed the petition dated 22.05.2025 through G & A Advocates LL.P. The petitioner prayed for reliefs as follows:
  - a. An Order be and is hereby issued compelling the respondent to immediately pay the Petitioner:
    - i. Unpaid/Unadjusted annual salary index value between 2022 and 2024 amounting to Index 534, being Kshs. 455,080 per month.
    - ii. Adjusted one-month salary in lieu of notice and accrued benefits up to the date of termination amounting to Kshs 455,080.
    - iii. Adjusted Payment in lieu of accrued leave days of 23.23 days amounting to Kshs 352,383.61.
    - iv. Adjusted End-year bonus (13th month salary) pro-rated up to the date of termination amounting to Kshs 371,544.77.
    - v. Adjusted severance pay (gratuity) calculated as 50% of basic monthly salary multiplied by 12 amounting to Kshs 3,389,697.
    - vi. Adjusted Axa Pension calculated including contribution of all applicable terminal dues amounting to Kshs. 2,069,341.77.
    - vii. Performance bonus for 2024 amounting to Kshs. 380,102.67.
    - viii. Adjusted Lost earnings amounting to Kshs 101,622,104.76..
  - b. In the alternative to (a) above, an Order be and is hereby issued compelling the respondent to immediately pay the petitioner:
    - i. One month salary in lieu of notice and accrued benefits up to the date of termination amounting to Kshs 388 608.00.
    - ii. Payment in lieu of accrued leave days of 23.23 days amounting to Kshs 300,912.13.
    - iii. End-year bonus (13th month salary) pro-rated up to the date of termination amounting to Kshs. 317,274.48.
    - iv. Severance pay (Gratuity) calculated as 50% of basic monthly salary amounting to Kshs 2,957,629.
    - v. Axa Pension calculated including contribution of all applicable terminal dues amounting to Kshs 2,044,994.33.



- vi. Performance bonus for 2024 amounting to Kshs. 324,582.38
  - vii. Lost earnings amounting to Kshs. 90,227,663.02.
- c. An Order be and is hereby issued that the respondent pay the petitioner the sum of Kshs. 46,000.00 as special damages incurred for psychological treatment sessions.
  - d. An order be and is hereby issued directing the respondent to pay general damages to the petitioner for constitutional and statutory violations.
  - e. An order be and is hereby issued directing the respondent to pay exemplary and punitive damages to the petitioner for the egregious and malicious violations of her constitutional and statutory rights.
  - f. An order be and is hereby issued compelling the respondent to immediately issue the petitioner a certificate of service to the petitioner in accordance with Section 51 of the *Employment Act*.
  - g. An order be and is hereby issued restraining the respondent to use the loans to blackmail the petitioner from perusing here rights and recourse available to the petition by law.
  - h. An order be and is hereby issued directing the respondent to award interest on all monetary awards at court rates to be assessed from the date of unlawful termination until payment in full.
  - i. The Honourable Court be pleased to grant such further orders, directions, and relief as it may deem just and expedient in the circumstances.
  - j. The costs of this Petition be awarded to the Petitioner.
2. The petitioner alleged several grievances including workplace discrimination and harassment manifested in particularized unfair labour practices; abuse of disciplinary processes on account of want of justification and due process; unilateral contractual violations particularized as imposition of extra work unilaterally; health, safety, and privacy violations including workplace physical and psychological harm; unlawful termination from employment and economic retaliation manifested in a dismissal for declining unilateral change to her job description and to attend the respondent's chosen doctor that she alleges invaded her right to privacy; and long term ham in lost future earnings.
  3. The petitioner pleaded the factual background to her employment relationship with the respondent with detailed particulars in that respects. She alleged violations of the Bill of Rights per Articles 27 on equality and non-discrimination; Article 29 on freedom from torture, cruel or degrading treatment; violation of Article 41 on fair labour practices including violation of the *Employment Act*; violation of Article 28 on freedom from torture and degrading treatment; violation of Article 31 on the right to privacy; violation of Articles 41 and 50 in relation to her rights as operationalized under the Data Protection Act; violation of Article 41 as read with Article 47 on fair administrative action; and, the petitioner particularized the particulars of the manner of the alleged violations.
  4. The respondent filed a notice of preliminary objection dated 20.10.2025 and through NBMA Advocates LLP. The preliminary objection was based upon the following grounds:
    - a. The petition does not disclose any or any colourable constitutional violation to sustain these constitutional proceedings.
    - b. The petition is an abuse of the process of the Honourable Court as any viable claim the petitioner may have against AFD (none being admitted), could and ought pursued by civil proceedings under the *Employment Act*, 2007.



- c. The petition is further an abuse of the Honourable Court as it has cynically and strategically lodged in an effort to deprive AFD from pursuing any claims it has against the petitioner.
  - d. This Court lacks the jurisdiction to hear this matter as the petitioner’s allegations as contained in its petition as to the alleged breach of its data rights ought to have been filed before the Data Protection Commissioner to enforce its alleged data rights under the Data Protection Act.
5. The parties filed their respective submissions. The Court has considered the parties’ respective positions and the material on record for and against the preliminary objection. The Court returns as follows.
6. The 1<sup>st</sup> issue is whether the petition should be struck out on account of the doctrine of constitutional avoidance. It is submitted for the petitioner that the petition is in breach of the principle of constitutional avoidance under which if there are other modes by which relief may be sought, then it is the mode that should be pursued and reference is to the decision of the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR. Further, the petition is an abuse of process for seeking to invoke the constitutional reliefs and opting for the constitutional route in the context of employment claims as has been held by the Court of Appeal in Summaya Athmani Hassan v Paul Masinde & NOCK [2019] eKLR, holding that a claim for breach of employment rights even where it included complaints of constitutional violations should be pursued under the Employment Act which gives statutory effect to the Constitutional guarantees of fair Labour practices. In that case the Court of Appeal held as follows,

“It is evident that the petition was hybrid combining violations of various constitutional rights; employment rights under the Employment Act and breach of the Public Officers Ethics Act. However, the underlying complaint was the alleged unlawful interdiction and subsequent dismissal of the 1<sup>st</sup> respondent by the Corporation and appellant. The specific remedies sought were general damages, terminal benefits and issuance of certificate of service. In determining the petition, the ELRC relied wholly on the provisions of Employment Act. The Article 41 rights are enacted in the Employment Act and Labour Relations Act. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1<sup>st</sup> respondent filed a petition directly relying on the provisions of the Constitution for enforcement of contractual rights governed by the Employment Act without seeking a declaration of invalidity of the provisions of the Employment Act or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of the Constitution. We adopt and uphold the general principle in the persuasive authority in Barbara De Klerk (supra) that where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in Communications Commission case (supra).”

7. It was submitted for the respondent that the alleged unlawful interdiction and termination of a contract of employment in the present petition was not a constitutional issue so that the petition did not disclose a cause of action anchored on the Constitution. Accordingly, the petition being incompetent, the court would be acting in excess of jurisdiction and erred in law in determining the petition.”
8. For the petitioner it was submitted that the Court has jurisdiction pursuant to Article 162 (2) (a) and section 12 of the Employment and Labour Relations Court Act. The jurisdiction is 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. It was submitted that the jurisdiction includes disputes that raise constitutional questions arising from employment and labour relations.
9. Further, constitutional right to petition courts is guaranteed by Article 22(1) thus, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or is threatened. That right includes the petitioner's entitlement to bring this petition to the court competent to hear employment and labour disputes where constitutional rights are alleged.
  10. It was submitted for the petitioner that the Court itself has rejected the argument that constitutional relief should be confined to ordinary civil or employment proceedings where the petition squarely pleads constitutional breaches and where constitutional remedies, including declarations, are sought. That in *Munir Sheikh Ahmed v National Bank of Kenya* [2018] KEELRC 185 (KLR), the Court, addressed an almost identical argument — that a petition raising constitutional violations should instead be pursued as an ordinary employment claim. The Court rejected that objection and held, “From the pleadings, the petition indeed sets out alleged violations of constitutional rights, while at the same time, makes claims for breach of the contract of service capable of being pursued in an ordinary action... it will be just, expeditious and proportionate for the matters to be heard and determined in the petition...” The Court further emphasised that *the Constitution* does not trivialise itself by permitting the enforcement of rights that overlap with rights under statute, rather, Article 19(3)(b) affirms that statutory rights form part of the broader matrix of constitutional rights unless inconsistent with the Bill of Rights. Further the Court observed thus, “The human rights and fundamental freedoms are not to be revisited and addressed only on a special occasion in a constitutional petition... *the Constitution* breaks the walls and mixes all other constitutionally lawful rights and freedoms... together as one.” It was submitted that in that case the Court ultimately held that the constitutional-avoidance doctrine has been significantly diminished under the 2010 Constitution, dismissed the preliminary objection, and directed that the petition proceed to hearing on its merits.
  11. The Court has considered the rival submissions. The Court has been guided by and taken into account the Court of Appeal holding as quoted above in *Summaya Athmani Hassan v Paul Masinde & NOCK* [2019] eKLR. The essence of the holding appears to be that a petition is trapped by the constitutional avoidance principle if the dispute as pleaded will be resolved by reference to the contract of service and protections under the *Employment Act* without necessity to invoke constitutional provisions. Thus, it further appears that where the petition is rooted in a contract of employment and the dispute will nevertheless require application of the constitutional provisions to determine the issues, then it is imperative that the petition stands as a proper constitutional dispute not trapped by the doctrine of constitutional avoidance.
  12. Applying that standard to the instant petition, while the dispute is pleaded to be founded upon the contract of employment between the parties, on the face of the pleadings, the petitioner alleges material facts in the course of her employment, during disciplinary process and at termination and whose particulars form a blend of grievances whose determination, by the pleaded case, will require the invoking of the constitutional provisions to determine. In such circumstances, it appears to the Court that the pleaded case will not be effectively and completely determined by mere application of the *Employment Act*, 2007 or other applicable statutes. The petition is not thereby trapped by the doctrine of constitutional avoidance. By the elaborate pleadings herein, the Court returns that the petition discloses a cause of action requiring determination by application of *the constitution*.
  13. The 2<sup>nd</sup> issue is whether the petition should be defeated by reason that it denies the respondent the opportunity to claims against the petitioner. First the objection should fail as it does not raise a pure



point of law based on undisputed pleaded facts as is the trite test for a proper preliminary point per *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors* (1969) EA 696 as restated in *Joho & another v Shahbal & 2 others* [2014] KESC 34 (KLR) as follows: “A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.” That the respondent has a claim is not pleaded at all in the pleadings on record and if at all pleaded, it is not shown that the petitioner would not dispute the same, At most, the preliminary point in that respect is speculative. The Court upholds the petitioner’s submissions thus, “The allegation refers to an undisclosed and hypothetical claim and invites the Court to infer the petitioner’s motive and the effect of the petition. Determination of alleged motive, strategic intent or effect of the petition requires examination of facts and evidence; they cannot be decided as a “pure point of law”.

14. Second, the Court considers that the petition would not preclude the respondent from filing a cross-petition or if necessary, from filing separate appropriate legal proceedings in the competent forum or Court as may be appropriate.
15. The 3<sup>rd</sup> issue is whether the petitioner can urge completion for violation of privacy rights and based on the [Data Protection Act, 2019](#) under which there exist prescribed enforcement mechanisms for obtaining relief under the statute. It was submitted that Data Protection Act is a complete code for making provision for the regulation of the processing of personal data; to provide for the rights of data subjects and obligations of data controllers and connected purposes. These include provisions for the investigation of complaints of violations of Data Protection Act and obtaining relief. So far as material to this Preliminary Objection the Act provides as follows:
  - a. Section 5 establishes the Office of the Commissioner of Data Protection (“the OCDP”) whose functions by section 8(1) includes overseeing the implementation and enforcement of the Act (ss8(1)(a); and, receive and investigate complaints by any person on infringements of the rights under this act (ss8(1)(f).
  - b. By section 9, the powers of the OCDPP include conduct of investigation either on its own initiative or “on the basis of a complaint made by a date subject or a third party” -ss9(1)(a), as well as incidental enforcement powers such as summoning witness, compelling provision of information and documents, issue witness summons impose fines etc.
  - c. Section 56 and 57 of the Data Protection Act expressly confer jurisdiction on OCDP to receive, investigate hear, and determine complaints of the nature set out in the Petition.
  - d. Section 58 authorizes OCDP powers to enforce provisions of the act via enforcement notices with additional powers conferred on that office by sections 60 to 63 (by which she can impose an administrative fine of up to Kshs 5 million.
  - e. Section 64 confers a right of appeal from decisions/actions of the OCDPP to this Honourable Court.
  - f. Regulation 58, inter alia, the mode by which any person aggrieved by noncompliance with Data protection Act may seek relief from the OCDPP.



16. It was therefore submitted for the respondent that view of this comprehensive statutory process, the Employment and Labour Relations Court lacks the original jurisdiction to hear and determine the present case. It has been consistently held in several cases such as *Opati v Safaricom Plc* [2025] KEHC 12798 (KLR) and *Ngunjiri v Kiambi & another* [2025] KEHC 3793 (KLR), that it is improper to institute proceedings before the Honourable Court instead of lodging complaints before ODCP falls foul of the well-entrenched doctrine of exhaustion as propounded by the Court of Appeal and Supreme Court. Further, in the *Ngunjiri* case (supra), Mugambi. J held that the OCDPP's jurisdiction and authority under the Data Protection Act emanated from Article 31 of *the Constitution* and for that reason, the petitioner's assertion of the Court's exclusive original jurisdiction emanating from *the Constitution* so as to oust that of other constitutionally enshrined tribunals fails scrutiny and ought to be dismissed.
17. For the petitioner it was submitted that her case includes inter alia a claim that the respondent violated her right to privacy contrary to Article 31 of *the Constitution*. The respondent contends that the petitioner ought to have filed a complaint before the Office of the Data Protection Commissioner rather than invoke the Court's jurisdiction. It was submitted that the position fundamentally misunderstood both the nature of the claim and the limits of the Data Commissioner's mandate.
18. It was submitted for the petitioner that the Office of the Data Protection Commissioner lacks jurisdiction to adjudicate constitutional violations or to grant constitutional remedies. While the Commissioner may investigate statutory breaches under the Data Protection Act, such alternative remedies are neither equivalent to nor adequate for the constitutional reliefs sought in this petition. In *Katiba Institute v Communications Authority of Kenya & 2 others; Data Privacy and Governance Society of Kenya & 3 others* (Interested Parties); *Ideate Policy Africa Limited (ITPA)* (Amicus Curiae) [2025] KEHC 10568 (KLR), where a similar objection was raised, the High Court held as follows,
- “The respondents did not demonstrate that the alternative remedy available would be effective, taking into account the fact that the petition sought declarations of invalidity of the impugned notices. That was because the jurisdiction of the court was donated by *the Constitution*... The petitioner having brought the petition claiming violation of *the Constitution* and a threat to violate rights and fundamental freedoms in the Bill of Rights, the respondents' argument that the petitioner could have invoked available alternative dispute resolution mechanisms could not succeed.”
19. Further, it was submitted that Similarly, the Supreme Court in *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others* (Interested Parties) [2023] KESC 113 (KLR) held that the availability of an alternative remedy does not bar a litigant from pursuing constitutional relief where the alternative mechanism is inadequate, as follows,
- “...right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrated the enforcement of fundamental rights and freedoms. The availability of an alternative remedy did not necessarily bar an individual from seeking constitutional relief. That was because the act of seeking constitutional relief was contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy was deemed inadequate in addressing the issue at hand, then the court was not restrained from providing constitutional relief.”
20. The Court has considered the rival submissions. The Court finds that the adequacy of reliefs before the Court and before the Office of the Data Protection Commissioner is contestable and as such does not pass the test for a proper preliminary point of law as is a futuristic or speculative argument.



21. What is clear in the instant issue are two points. First, the Court is guided by the cited Supreme Court decision that availability of alternative statutory mechanism for resolution of a dispute will not bar a litigant from pursuing appropriate relief through a constitutional petition for enforcement of the Bill of Rights or other constitutional provisions as envisaged in Articles 22 and 258 of *the Constitution*. Second, the issue appears to be that the Commissioner and the Court have concurrent jurisdiction on merits of the dispute as far as it may fall short of a constitutional dispute, albeit, the Commissioner enjoys an inferior concurrent jurisdiction. The Court considers that in eventuality of such concurrent jurisdiction with subordinate courts or inferior tribunals or other statutory adjudicators such as the Commissioner in the instant case, in disputes related to employment and labour relations where the Court enjoys exclusive original and appellate jurisdiction, the Court would rather assume than decline jurisdiction. Section 12(1) of the *Employment and Labour Relations Court Act* defines the jurisdiction of the Court in mandatory terms thus, “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 -....” The Court considers that for cases falling for its determination within its jurisdiction, the Court cannot be at liberty to decline jurisdiction which appears to be otherwise, mandatory to exercise like in the instant case whereby the alleged violation of privacy founded upon personal data or personal identifiable information allegedly accrued out of an employment and labour relations contract. The Courts cannot be entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction.
22. The Court in so finding is seriously persuaded by the principle established in the decision of the Supreme Court of South Africa in *South African Human Rights Commission (SAHRC) v Standard Bank of South Africa Ltd and Others* [2022] ZACC 43 (Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Theron J, Tshiqi J and Unterhalter AJ) where it was held that where a High Court has inherent jurisdiction over a matter, it must entertain the case properly brought before it, and generally has no discretion to refuse simply because another forum (like the Magistrates’ Court or an optional statutory body) could also potentially hear the dispute. At the heart of the application in that case was whether a High Court may decline to adjudicate a matter over which it and the Magistrates’ Courts have concurrent jurisdiction. Madlanga J in the unanimous decision stated thus,
- “29. The assumption of jurisdiction should not be confused with the manner in which a court decides to exercise its jurisdiction. There is no discretionary power to decline the assumption of jurisdiction over a matter within the jurisdiction of a court. But how a court decides to exercise the jurisdiction it enjoys is a separate issue. That issue includes considerations as to whether in exceptional circumstances jurisdiction is not exercised by reason of, for example, abuse of process or the stay of proceedings pending some other form of dispute resolution, or on grounds of comity. In certain special circumstances, a South African court may take the view that considerations of comity dictate that a matter is best left for adjudication by a foreign court, which has a closer connection to the matter.” And further,
- “35. I do not quite see how courts can create such a rule. The SAHRC submits that just like courts created the mandatory jurisdiction principle, which is a common law rule, they can also create the default rule. This misses the point. The law affords the High Court the power to entertain matters in respect of which the Magistrate’s Court also has jurisdiction. All that the mandatory jurisdiction principle says is that the High Court cannot run away



from matters that fall within its jurisdiction. If a matter over which it has jurisdiction is brought before it, it must exercise that jurisdiction. Of course, that is subject to the exceptions that are recognised by the principle itself. By contrast, the effect of the proposed default rule is the creation of a substantive rule of jurisdiction to the effect that the High Court will ordinarily defer to the Magistrate’s Court unless there is good reason to accept jurisdiction. That, when the law affords it unqualified concurrent jurisdiction.” The Court concluded that a court either has jurisdiction or it does not and further, the division of labour mandated by the Legislature between courts in respect of their jurisdiction must be honoured.

23. The Court therefore finds that it enjoys jurisdiction in the instant case in view of provisions of Article 162(2) (a), Article 165(5) of *the Constitution* as read with section 12 of the *Employment and Labour Relations Court Act*. That jurisdiction is not defeated by reason of an alternative dispute resolution mechanism as urged for the respondent. However, in assuming the jurisdiction, the Court has considered the alternative dispute resolution mechanisms as urged in the preliminary objection. The Court finds that it would not be desirable to apportion that part of the dispute to be heard and determined under the statutory mechanisms because doing so would be cumbersome, expensive, and inimical to the right to access to justice as provided in Article 48 of *the Constitution*. Most important, the dispute as pleaded raises alleged constitutional violations which are a preserve of the Court’s exclusive and original jurisdiction in the circumstances of the pleaded case.
24. In view of the findings, the preliminary objection dated 20.10.2025 is liable to dismissal with costs in the cause.

In conclusion, orders are given as follows:

1. The preliminary objection is hereby dismissed with costs in the cause.
2. Parties to take directions for further steps for expeditious disposal of the petition.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 17<sup>TH</sup> DECEMBER, 2025.**

**BYRAM ONGAYA,  
PRINCIPAL JUDGE**

