



**Chepkorir v Tristar Global Logistics Limited (Employment and Labour Relations
Petition E164 of 2023) [2025] KEELRC 207 (KLR) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 207 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E164 OF 2023
AN MWAURE, J
JANUARY 31, 2025**

BETWEEN

JANNET MERCY CHEPKORIR PETITIONER

AND

TRISTAR GLOBAL LOGISTICS LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Petitioner filed a Petition dated 5th August 2023.

Petitioner's case

2. The Petitioner avers that she was employed as an Inventory Manager at MLB Mogadishu by the Respondent whose registered offices are within the Republic of Kenya.
3. The Petitioner avers that she was promoted to Manager, but the Respondent refused to upgrade her living accommodation.
4. The Petitioner avers that she shared her living accommodation with two cleaning staff, while other employees in lower grades were provided with their rooms who were of Somali origin, which led the Petitioner to feel that she was being discriminated against.
5. The Petitioner avers that her responsibilities in charge of the overall inventory management for Mogadishu Logistics base and region but not limited to were as follows:-
 - a. Driving operational inventory excellence;
 - b. Physical counting of all expendable and non-expendable assets and material items at the warehouses and all containers in Mogadishu support base yard;



- c. Developing and maintaining inventory specific KPIs
 - d. Stock transfer and adjustment process monitoring
 - e. Management of the activities of all staff members engaged in the inventory control process.
6. The Petitioner avers that she dispensed her responsibilities from 1st March 2020 as per the terms of employment.
 7. The Petitioner avers that the Respondent reviewed her salary to a net of USD 1,200 as monthly compensation in addition to other allowances and benefits as a professional working in a foreign country.
 8. The Petitioner avers that she contracted COVID-19 while in the office and sought medical assistance in Mogadishu.
 9. The Petitioner avers that due to inadequate medical institutions, she travelled to Nairobi to seek medical attention.
 10. The Petitioner avers that she took 18 leave days which was approved and was supposed to resume work on 17th May 2021.
 11. The Petitioner avers that she could not travel back to Mogadishu and was placed into quarantine on 24th May 2021.
 12. The Petitioner avers that she was served with a termination letter on 25th May 2021.
 13. The Petitioner avers that the wrongful dismissal from her employment violated her rights under Articles 27, 28, 41, 43, 45 and 47 of the Constitution.
 14. The Petitioner prays for orders against the Respondent as follows:
 - a. A declaration that the Petitioner's rights as enshrined in Articles 27 (4) and (5) of the Constitution of Kenya 2010 with respect to equality and freedom from racial discrimination on the basis of her health status have been infringed by the acts and/or omissions of the Respondent.
 - b. A declaration that the Petitioner's rights as enshrined in Article 28 of the Constitution of Kenya with respect to her right to inherent dignity and the right to have that dignity respected and protected have been infringed by the acts and/or omissions of the Respondent.
 - c. A declaration that the Petitioner's rights as enshrined in Article 43 of the Constitution of Kenya 2010 with respect to her right to the highest attainable standards of health have been infringed by the acts and/or omissions of the Respondent.
 - d. A declaration that the Petitioner's rights as enshrined in Articles 41(1) and 47 of the Constitution of Kenya with respect to fair labour practices and fair administration action have been infringed by the acts and/or omissions of the Respondent.
 - e. A declaration that the Petitioner is entitled to damages for violation of her constitutional rights under Articles 27,28, 41, 43, 45 and 47 of the Constitution of Kenya to be assessed by this Honourable court.
 - f. 12 months' gross salary for wrongful dismissal and unfair termination totalling USD 14,400.



- g. This Honourable Court to issue such further orders and give such directions as it may deem fit to meet the ends of justice and the protection of the Constitution and in the context of the declarations made.
- h. The costs of the Petition be awarded to the Petitioner.

Respondent's replying affidavit

- 15. In opposition to the Petition, the Respondent filed a replying affidavit dated 19th July 2024.
- 16. The Respondent avers that the Petitioner's contract of employment was for three years with an option of extension for two years at the Respondent's discretion.
- 17. The Respondent avers that it promoted the Petitioner to the position of Inventory Manager with an immediate pay rise of USD 200 and another USD 200 in the last quarter of the inventory period.
- 18. The Respondent avers that contractual obligations were adhered to by providing good and safe accommodation in the only ladies' hostels in line with her right to human dignity as protected under Somalia Laws.
- 19. The Respondent avers that the Petitioner contracted COVID-19 and provided quarantine accommodation for her.
- 20. The Respondent further avers that it catered for the expenses of COVID-19 testing, and medication to assist in her speedy recovery and attended to by qualified medical personnel.
- 21. The Respondent avers that the Petitioner was granted and approved 18-days leave request to travel to Nairobi.
- 22. However, the Respondent avers that 29 days were approved, even though the Petitioner is only entitled to 21 days according to clause 8 of her employment contract.
- 23. The Respondent avers that the extra days were sick leave for the Petitioner to allow time to recover from the effects of COVID-19.
- 24. The Respondent also avers that it catered to the Petitioner's transportation costs from Mogadishu to Nairobi and COVID-19 in accordance with the contractual provisions.
- 25. The Respondent avers that the Petitioner failed to return to work as expected on 17th March 2021 and did not officially communicate to the Human Resource department about the difficulties experienced that affected her capacity to report on time.
- 26. The Respondent avers that the Petitioner did not provide any evidence to show any communication requesting the COVID-19 test to be conducted.
- 27. The Respondent avers that the Petitioner's conduct was not proper as she was rude to employees and even those in authority.
- 28. The Respondent also avers that the Petitioner had an altercation in the ladies' quarters and was issued with a warning letter.
- 29. The Respondent avers that the Petitioner was summarily dismissed for her failure to report to work as per the agreed timelines in her approved leave requested form and her disrespect of persons with authority over her.



30. The Respondent avers that the Petitioner was paid one month's salary in lieu of notice as per clause 7(a) and (b) of her contract and facilitated her travel back to Nairobi on 26th May 2021.
31. The Respondent avers that it followed the fair process of termination of an employee for gross misconduct prescribed in the Employment Laws of Somalia which applied to the Petitioner's termination as per clause 7(c) of the contract.
32. The Respondent avers that the Petitioner's dismissal was not in relation to her health status but her gross misconduct.
33. The Petition herein was canvassed by way of written submissions.

Petitioner's submissions

34. The Petitioner submitted that her dismissal violated her right under Article 47 of the Constitution which provides as follows:
 - (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 - (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration
35. The Petitioner also submitted that her termination was contrary to the Respondent's Employee Code of Conduct and Disciplinary Procedure.
36. The Petitioner submitted that her termination was unfair which was contrary to section 45(2) of the Employment Act which provides as follows:

“ A termination of employment by an employer is unfair if the employer fails to prove—

 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.”
37. The Petitioner relied on the case of Jared Aimba V Fina Bank Limited [2016] KECA 452 (KLR) where the Court of Appeal held that according to sections 45 and 41 of the Employment Act, terminating an employee for a valid reason or due to misconduct must follow a fair process. This includes notifying the employee of the reasons for termination and providing them with an opportunity to respond before the termination occurs.



38. In Kenya Union of Commercial Food and Allied Workers V Meru North Farmers Sacco Limited [2014] KEELRC 813 (KLR) the court held that section 41 of the *Employment Act* is written in mandatory terms. If an employer fails to adhere to these mandatory provisions and subsequently terminates an employee through such a flawed process, the termination is deemed ultimately unfair.
39. The Petitioner submitted that there is sufficient evidence to show that the Respondent violated her rights under Articles 27, 28, 41, 43, 45 and 47 of the *Constitution* and relied on the case of Naftali Mogaka Nyaboga v Kisii County Government and another [2022] KEELRC 132 (KLR) where the court awarded Kshs.1,000,000/= to the Claimant as damages for violation of his rights under Articles 27, 28, 41, 43, 45 and 47 of the *Constitution* being freedom from discrimination and inhumane treatment, right of fair labour practices and fair administrative action.
40. Also, in Gilbert Mwangi Njuguna V Attorney General [2014] KEELRC 726 (KLR) where the court cited the case of Privy Council in Appeal No. 13 of 2004 Attorney General of Trinidad & Tobago V Ramawop as follows:
- “The function that the granting of relief is intended to serve is to vindicate the constitutional right. In some cases, a declaration on its own may achieve all that is needed to vindicate that right. This is likely to be so where the contravention has not yet had any significant effect on the party who seeks relief.
- But in this case, the contravention was as the judge said, calculated to affect the appellant’s interests and it did so.”
41. The Petitioner submitted that she is entitled to USD 14,400 being compensation for 12 months’ salary for unfair termination which is provided under section 49(1)(c) of the *Employment Act*.
42. The Petitioner submitted that she is entitled to the maximum compensation of 12 months’ salary and relied on the case of Kenya Broadcasting Corporation V Geoffrey Wakio [2019] KECA 65 (KLR) where the Court of Appeal upheld as follows:
- “(22) This Court has established the rule that an award of the maximum 12 months’ pay must be based on sound judicial principles. In OI Pejeta Ranching Limited vs. David Wanjau Muhoro [2017] eKLR this Court categorically stated that the trial Judge must justify or explain why a claimant is entitled to the maximum award; that the exercise of discretion must not be capricious or whimsical.
- (23) The learned Judge explained that the award of 12 months gross salary was in consideration of the immense loss suffered by the respondent during the long criminal trial, the blatant disregard for fair labour practices by the appellant and the impracticality of reinstatement. In his judgment, the learned Judge concluded that reinstatement was impractical due to the long period that had passed since the dismissal.”
43. The Petitioner submitted that she was not accorded proper procedural fairness during her termination, which was communicated in a letter dated 24th May 2021. As a result, she urges this Honourable Court



to compensate her for the loss of employment. The Petitioner relied on the case of Walter Ogal Anuro V Teachers Commission (2013) eKLR where the court held that:

“For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with the establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

44. The Petitioner urged this Honourable to enter judgment in her favour as prayed in the Petition.

Respondent’s submissions

45. The Respondent submitted that this Honourable court does not have jurisdiction as the applicable law to be used is Somali law according to clause 18 of the contract of employment and the jurisdiction as well.

46. The Respondent submitted that the issue of jurisdiction can be raised at any point of the proceedings as it is an important issue in determining the petition. The Respondent relied on the case of Jamal Salim V Yusuf Abdulahi Abdi & Ali Salado Abdi [2018] KECA 14 (KLR) in support of that proposition.

47. It is in the Respondent’s submissions that this Honourable Court acknowledged that the law applicable to the dispute between the Petitioner and the Respondent is Somalia Law as is expressly provided in the employment contract dated 19th March 2019. Furthermore, this Honourable Court recognized that the employment contract states that any breach is to be resolved by “any court of equitable jurisdiction.” The Petitioner also submitted that jurisdiction is not automatically conferred upon this Honourable Court, especially when the dispute is anchored in foreign law.

48. The Respondent relied on the case of Macharia and another V Kenya Commercial Bank Limited & 2 others [2012] KESC 8 (KLR) where the Supreme Court held that a court’s jurisdiction derives from the Constitution, legislation, or both. Therefore, a court of law can only exercise the authority granted by the Constitution or other written law.

49. In Yusuf Gitau Abdallah V Building Centre (K) Ltd & 4 others [2014] eKLR Justice Ibrahim stated as follows:

“(16) This Court can only assume jurisdiction bestowed to it by the Constitution and/or Statute. Just as in the S. K. Macharia case, the Court said that it cannot assume jurisdiction by way of judicial craft; this Court will not assume jurisdiction by way of a litigant’s pestering. The Court’s mandate is to do justice, however, that justice can only be dispensed through the laid down legal framework.... Courts of justice have the jurisdiction to do justice and not injustice...”

50. In the South Africa case of South African Tourism V Tebogo Brian Monare and others Case No. JR 2298/11 cited the case of Serfontein V Balmoral Central Contracts SA (Pty) Ltd (2000) 21 ILJ 1019 (CCMA), where the court held that when a contract does not specify a forum, it must determine if the employment relationship’s obligations are enforceable within South Africa. This involves considering where the employee works, where payment is made, the parties’ locations, how remuneration is calculated, the currency used, and where the relationship was established. None of these factors alone is decisive.



51. The Respondent submitted that the courts in Somalia are best suited to enforce the contract due to its execution and jurisdictional linkage to Somalia. This Honourable Court should not assume jurisdiction over activities outside its scope, especially since the applicable law is Somali. The contract is subject to Somali laws, and the Somali Constitution protects the rights the Petitioner claims were violated, including social equality, health, worker protection, and fair administrative action under Articles 23, 33, 36, 38, and 39 of the Constitution.
52. The Respondent submitted that the Petitioner's dismissal was fair and reasonable as it amounts to misconduct. In *John Jaoko Othino V Intrahealth International* [2022] eKLR the court cited the case of *British Leyland UK Ltd V Swift* [1981] IRLR 91, where it stated that to determine if the termination was fair, it should use the "band of reasonable responses" approach. Lord Denning stated as follows:
- "The conduct test: Was it responsible for the employers to dismiss him" If no responsible employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quote reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him."
53. The Respondent relied on the Halsbury's Laws of England [4th Edition] on page 482 which expounds on the principle of the band of reasonableness as follows;
- "In adjudicating on reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views with those of the employer and decide whether it would have dismissed on those facts. It must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on the same facts. The basis of this approach [the range of reasonable test] is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take another; the function of a tribunal as an industry jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair but if it falls outside the band, it is unfair."
54. It is in the Respondent's submissions that it complied with Somali labour laws by providing a safe working environment and addressing the Petitioner's needs, including health needs when she contracted COVID-19.
55. The Respondent also submitted that the termination followed due process according to contract and Somali employment laws, and therefore, the dismissal was not wrongful or unfair.
56. The Respondent submitted that the Petitioner has not provided sufficient evidence to support the allegations of constitutional rights violations. The Respondent relied on the case of *Christian Juma Wabwire V the Attorney General* [2019] KEHC 1049 (KLR) where the court emphasized that the petitioners must present tangible evidence of rights violations. The Respondent argued that there were no rights violations during the employment contract and that the Petitioner's claims of racial discrimination due to her COVID-19 status are not proved.



57. The Respondent submitted under the Black's Law Dictionary, 10th Edition defines discrimination as failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.
58. The Respondent further submitted under the UN Committee on the Elimination of Racial Discrimination, in its General Recommendation XIV (at page 1), racial discrimination was defined as extending "beyond measures which are explicitly discriminatory, to encompass measures which are not discriminatory at face value but are discriminatory in fact and effect".
59. According to Discrimination (Employment and Occupation) Convention of 1958, defines the term discrimination in Article 1 to include "such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."
60. The Respondent submitted that the Petitioner was not discriminated and failed to adduce evidence in support of the allegations thus her right to discrimination was not violated under Article 28 of the Constitution. In *Khen Kharis Mburu V Inspector General Police Service and 3 others* [2019] KEHC 3152 (KLR) where the court held that in a constitutional litigation, a party claiming a violation of rights must accurately and precisely plead the specific right violated, the constitutional article infringed, and the jurisdictional basis. It is an established legal principle that anyone seeking relief for such violations must clearly outline these details.
61. The Respondent submitted that the Petitioner's right to administrative action was not violated, as all procedural requirements under the Somalia Labour Code, 1972, were followed. The Respondent also submitted that the Petitioner's economic and social rights were respected, providing medical care and additional leave for recovery. The dismissal was unrelated to her health status and failed to provide specific evidence of constitutional rights violations.
62. In *Anarita Karimi Njeru V Republic* [1979] KECA 12 (KLR) the Court of Appeal emphasized that when seeking redress from the High Court on constitutional matters, it is crucial to clearly and precisely outline the complaint, the specific constitutional provisions alleged to be infringed, and the manner of the infringement.
63. The Respondent submitted that the Petitioner is not entitled to the reliefs sought in the Petition as there were no violations of the Petitioner's constitutional rights under the laws of Somalia or the Constitution of Kenya 2010. Therefore, the Respondent urges that this Honourable court dismiss the claims with costs.

Analysis and determination

64. Having considered the petition, the replying affidavits and the submissions on record, the main issue is-
 - (a) Whether the Petition is merited,
 - (b) The issue of unfair/wrongful termination is also of consideration.
 - (c) was the claim of discrimination proved against the claimant?
65. In *Owners of The Motor Vessel "Lillian S V Caltex Oil (Kenya) Ltd* [1989] KECA 48 (KLR) the Court of Appeal held as follows:

"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make



one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

66. In this instant case, the issue of jurisdiction was already addressed vide a ruling on 14th May 2023. This Honourable court held that Somali law is applicable, but the same contract also provides that a breach of the said contract can be addressed in any court with equitable jurisdiction. The court differentiated between law applicable and jurisdiction as dealt with in the case of Dorcas Kemunto Wainana -vs- IPAS (2018) eKLR where court applied the objective test which entails investigation into which law and jurisdiction does the contract have the most real connection. This matter has already been resolved, and so this Honourable court will not revisit it.

67. As for the issue of whether claimant was unfairly or wrongfully terminated Section 45(2) of the *Employment Act* has been reiterated in the preceding part of the underlisted judgment. In CMC Aviation Limited V Mohammed Noor [2015] KECA 775 (KLR) the Court of Appeal held as follows:

“Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee’s service but the employer does it in a procedure that does not conform with the provisions of a statute that still amounts to unfair termination.”

68. In Jared Aimba V Fina Bank Limited(supra) the Court of Appeal held as follows:

“...under sections 45 and 41 of the *Employment Act*, termination for a valid reason or on grounds of misconduct is supposed to be accompanied by a fair process involving notification of the employee of the grounds and affording the employee an opportunity to be heard prior to the termination.”

69. In this instant case, the Petitioner was terminated while she was quarantined in Nairobi. It was noble for the Respondent to cater for the Petitioner’s medical expenses and transport. Having done so the respondent was unhappy with some communication by the Petitioner. They therefore wrote a letter to the Petitioner on 24th May 2021 and informed her that the organisation could no longer meet her demands. She was accused of having communicated rudely and so she was henceforth terminated from her employment.

This clearly was tantamount to a summary dismissal despite being paid one month salary in lieu of notice. She signed the termination letters a day later on 25th May 2021 and that was the way she left her employment

70. As it is, the petitioner had suffered from COVID 19 disease and was still recuperating. According to the respondent she was meant to report back to work on 17th May 2021.

The Petitioner says she could not travel back to Mogadishu and was put on quarantine.

The court like everybody else globally know the repercussion and trauma that COVID 19 caused. The respondents therefore should in all fairness have given the Petitioner the benefit of doubt and listened to her explanation.

71. The respondent did not comply with Section 41 of the *Employment Act* and did not give the Petitioner a chance to be heard. Section 41 of the *Employment Act* provides as follows:-

41.(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is



considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.
72. The court in the often cited case of Walter Ogal Onuro -vs- Teachers Service Commission Cause 955 of 2011 stated as follows-
- “The court noted that termination to pass the fairness test, it ought to be shown that there was not only substantive justification for termination but also procedural fairness. Further Section 43 of the *Employment Act* obligated an employer to prove the reason for termination of employment where failed to do so the termination was deemed to have been unfair.
73. The court finds the Petitioner was not accorded an opportunity to be heard before her termination and so the said termination is unfair and wrongful and unprocedural.
74. The claim for discrimination however has not been proved. There is no evidence that the Petitioner was terminated due to racial or tribal bias or due to sickness. She was accused of not having been satisfied with her employer and hence was terminated.
75. The case of Khen Kharis Mburu -vs- Inspector General of Police Service and 3 Others (2019) eKLR cited by the Respondent the court held that a party claiming a violation or a right must accurately and precisely plead the specific rights violated”.....”
- This court does not find such precise averment of discrimination against the Petitioner. This prayer is therefore not proved and is denied.
76. The prayer awarded to the Petitioner as per her petition is on wrongful and unfair dismissal but the other prayers referring to constitutional violations are all not proved and so are declined.
77. The Petitioner worked for a fairly short period for the Respondent and even though she is entitled to compensation for wrongful termination it would be excessive to award her equivalent of 12 months of her salary. She is granted 3 months equivalent of her salary totalling \$3600.
78. She is also awarded costs of the Petition and interest at 14% per annum from date of Judgment until full payment.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF JANUARY, 2025.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments



and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the *Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the *Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

