



**Orioki v Del Monte Kenya Limited (Petition E021 of 2025)
[2025] KEELRC 2052 (KLR) (10 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2052 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E021 OF 2025**

**B ONGAYA, J
JULY 10, 2025**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010
ARTICLES 10, 19(2), 20(1) (2) (3) & (4), 21(1), 23(3), 41, 47(1) &
(2), 50(1), 258(1) AND 259(1)**

AND

**IN THE MATTER OF THE EMPLOYMENT ACT, 2007, LAWS
OF KENYA**

AND

**IN THE MATTER OF THE FAIR ADMINISTRATIVE
ACTION ACT, 2015**

AND

**IN THE MATTER OF THE DOCTRINE OF LEGITIMATE
EXPECTATIONS**

BETWEEN

DENIS OMWOYO ORIOKI PETITIONER

AND

DEL MONTE KENYA LIMITED RESPONDENT

JUDGMENT

1. The petitioner filed the petition and supporting affidavit dated 14.02.2025 through P. A. Kwega & Company Advocates. He sought the following reliefs:



- i. A declaration that the respondent violated the petitioner's fundamental rights and freedoms.
 - ii. A declaration that the respondent violated the petitioner's rights as enshrined under Articles 10, 24, 27, 41, 47 and 50 of the Constitution.
 - iii. A declaration that the petitioner was unfairly terminated.
 - iv. Compensation to the petitioner for the violation of his fundamental rights and freedoms.
 - v. Compensation for loss of employment for unfair termination.
 - vi. Damages for mental and psychological anguish.
 - vii. Exemplary damages.
 - viii. Costs of this petition.
 - ix. Any other relief that this Honourable Court may deem just to grant.
2. The petitioner's case was as follows:
- a. The respondent's Human Resource Manager acted capriciously, unjustly, unfairly, irrationally, unreasonably, maliciously, in bad faith, unlawfully and unconstitutionally against the petitioner.
 - b. The respondent engaged the petitioner as a Human Rights Manager through an employment agreement dated 30.05.2024 with effect from 15.07.2024. He diligently worked for the respondent, including on public holidays. Among other duties, he was responsible for the following:
 - i. Overseeing human rights strategies and the development of its objectives and KPIs.
 - ii. Implementing meaningful human rights due diligence actions, including accessing, managing and monitoring the business impact on human rights, security and the environment.
 - iii. Work with key stakeholders to develop a detailed plan of action to address human rights challenges in the workplace and in the surrounding community, including overseeing the implementation of the plan.
 - iv. Develop and implement stakeholder and community engagement strategies to address human rights issues and build lasting relationships with these stakeholders.
 - v. Support the development and roll out of the company's grievance management system, facilitating the integration of learnings and remedial efforts into the human rights due diligence process.
 - c. Despite setting up his objectives that were in tandem with the respondent's objectives, in good faith, he did not receive any feedback when he shared the same with his line manager.
 - d. By a letter dated 08.01.2025, the respondent's human resource manager informed the petitioner that his contract had been terminated because his overall performance had not met the company's expectations, with the key concern being a lack of attention to essential duties and difficulties with team integration.
 - e. According to the petitioner, he had never been informed that his performance was not meeting the company's expectations, save for one instance on 13.12.2024, when he was unable to



submit one report to his line manager on time due to unforeseen reasons beyond his control. He informed his line manager of the same, but the line manager shouted and raised his voice at him, did not listen to him or at the very least consider his explanation for the delayed submission of the work. He believes that this caused the termination of his employment.

- f. The petitioner raised a complaint to the respondent's global human resource against the office and person of the human resource manager regarding perceived victimization and lack of due process in handling the issue he had raised, but it went unaddressed.
 - g. In addition, the respondent neither subjected the petitioner to any performance evaluation procedures nor was the poor performance alleged in the termination letter explained and or shared with him to give him a chance to defend himself and/or address the same.
 - h. The petitioner was issued a show cause letter dated 16.12.2024 requiring his response within 24 hours and inviting him to a disciplinary hearing scheduled for 17.12.2024. He responded to the show cause on 17.12.2024, addressing all the issues the show cause letter had outlined.
 - i. During the disciplinary hearing on 17.12.2024, his email communication to the respondent's managing director was discussed, and he confirmed that the contents of the email truly depicted what the respondent's managing director had communicated to him.
 - j. The respondent's human resource manager issued him a first warning letter on 20.12.2024, which referred to the petitioner's communication with the managing director, also his line manager, terming the said communication as insulting, inappropriate, sensitive and with racial undertones. However, he had neither committed nor repeated any offence to warrant a first warning letter.
 - k. The petitioner's contract was terminated on issues not related in any way to the show cause letter or the disciplinary hearing he attended, and in disregard to provisions of the disciplinary procedure manual. He noted that clause 15.0 of the respondent's Disciplinary Procedure Manual provides for termination for cause on account of major offences or after an employee has received two warning letters within a year. After the second warning letter within a year, at the third offence, the employee's services are terminated.
 - l. For his case, he neither committed any successive offences requiring termination nor received two warning letters regarding the same.
 - m. The petitioner has been adversely affected and aggrieved due to the respondent's impugned actions, and he is highly qualified to perform to expectation in the role he was holding at the respondent's company.
 - n. The respondent violated the petitioner's rights under sections 41, 43 and 45 of the [Employment Act](#), 2007. He was not given any documentary evidence in support of the complaints or allegations the respondent raised against him in the warning letter and the termination letter. There was inadequate notice and insufficient opportunity to respond to the allegations.
 - o. The respondent's agents were biased against the petitioner to arrive at a pre-determined outcome, which was to terminate his employment.
 - p. The petitioner legitimately expected the respondent to confirm his employment, given that his performance was meeting the company's expectations.
3. The petitioner particularised the violation of the [Constitution](#) of Kenya as follows:



- i. The respondent has violated the petitioner's rights guaranteed under Articles 10, 25, 41, 47(1) and (2), and 50(1).
 - ii. The respondent did not grant him a fair hearing under Article 50 and fair administrative action under Article 47.
 - iii. He was not given a fair chance to defend himself against the allegations outlined in the termination letter, thereby infringing upon his rights under Articles 47 and 50.
 - iv. The process of termination, as carried out by the respondent, was also contrary to the principles of natural justice and his rights under Articles 41, 47, 48 and 50(1).
4. The respondent filed a replying affidavit of Gedion Kimutai sworn on 04.03.2025, through Daly Inamdar Advocates LLP. It prayed that this Court determine that the instant petition is a violation of the doctrine of constitutional avoidance, and dismiss the same in its entirety with costs to the respondent. It was urged as follows:
- i. The petition does not expressly disclose any infringement of fundamental rights and freedoms enshrined under the Constitution of Kenya.
 - ii. This Court lacks jurisdiction to hear and determine this matter under the doctrine of constitutional avoidance, as determined in Supreme Court Petition 14, 14A, 14B and 14C of 2014 - Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR.
 - iii. The doctrine of ripeness and constitutional avoidance asserts that a constitutional issue is not ripe for determination until the determination of the constitutional issue is the 'only' course that can give the litigant the remedy he seeks.
 - iv. In this case, the petition is not the only course that can give the petitioner the remedy he claims. The petitioner's case is fundamentally grounded on issues of alleged unfair and unprocedural termination of his employment with the respondent, which can be properly canvassed before this Honourable Court.
 - v. In addition to the employment contract, the petitioner was issued a job description that detailed his duties, responsibilities, expectations and general overview of the position of Human Rights Manager.
 - vi. On 09.12.2024, the respondent's managing director received instructions from Claudia Teresa Pou, a director of the respondent, requesting an update of the human resource policy - HRIA Action Plan to distribute to the respondent's retailers.
 - vii. The respondent's managing director proceeded to task the petitioner to update the HRIA Action Plan and submit the same by 13.12.2024. However, by 6:00 pm on 13.12.2024, the petitioner had yet to submit his work contrary to instructions. When the managing director tried calling him on his mobile phone, the calls went unanswered.
 - viii. Consequent to the petitioner's failure to submit the task on the HRIA Action Plan within the stipulated timeline and in violation of his job description, the respondent's managing director informed him that his probation period would be extended. The petitioner responded by writing various messages to the managing director, alluding to abuse of power and authority, and racism, yet he had failed to do his job.



- ix. The petitioner's SMS and email to the respondent's managing director was an act of insubordination, and in the circumstances, he was reported to the HR Manager as per the respondent's human resource policy.
 - x. On 14.12.2024, the respondent's human resource manager wrote to the petitioner notifying him that his conduct was unprofessional and requesting that he comply with the laid-down procedures of conflict and dispute resolution as per the company's policy. However, the petitioner failed to utilise the mechanism.
 - xi. The respondent's human resource manager subsequently issued the petitioner with a show cause letter. On 16.01.2025, the petitioner was issued a notice to attend a disciplinary hearing scheduled for 17.01.2024. He was informed that he could call a witness and be accompanied to the hearing by another employee or colleague from the company.
 - xii. When the petitioner asked for more time to prepare, the respondent agreed to reschedule the disciplinary hearing to 19.12.2024, on which day the hearing eventually took place.
 - xiii. Although the respondent understood that the petitioner had encountered personal hurdles in meeting the deadline for submitting the HRIA Action Plan, it noted that the petitioner could have reached out to his line manager to communicate in advance that he would not meet the deadline and request for support in the form of an extension, but he had failed to do so.
 - xiv. The respondent thus issued the petitioner with a first warning letter, cautioning him to act appropriately and professionally befitting the workplace, and to utilize the established channels for lodging a formal complaint.
 - xv. The petitioner continued working with the respondent while serving his probation period, which was to lapse on 15.01.2025. However, the respondent resolved not to confirm his employment because his overall performance had not met expectations, and communicated that decision to him by a letter dated 08.01.2025. According to the respondent, the petitioner's employment was terminated because his employment was not confirmed.
 - xvi. Upon termination of his employment, the respondent proceeded to settle all the petitioner's terminal dues in the sum of Kshs. 350,650.05.
 - xvii. The respondent did not violate any rights and/or freedoms as alleged. There was no legitimate expectation to breach in the first place, as his employment contract stipulated that confirmation of employment would be subject to satisfactory progress during the probation period. The disciplinary process was conducted according to the human resource policy, the law and the rules of natural justice.
5. The petitioner then filed his further affidavit sworn on 17.04.2025 through P. A. Kwegu & Company Advocates, averring that:
- a. The respondent's assertion that this Court lacks jurisdiction based on the doctrine of constitutional avoidance is misconceived and legally unsound, and should be dismissed.
 - b. The instant petition is not a mere employment dispute but one that raises substantial constitutional issues, including violations of particular provisions of the Constitution. This Honourable Court is therefore the most appropriate forum for determination.



- c. The violation of constitutional rights by the respondent has been set out in the petition with reasonable precision, that is, the rights to fair trial, fair labour practices, fair administrative action, access to justice and fair hearing.
 - d. He delivered his work on time during his employment, even while working under strict deadlines, and duly informed his line manager of the reason for delaying his submission of the HRIA Action Plan. He communicated to him via a call at 14:06 hours that he would submit the work by 7:00 pm that evening, which his line manager agreed to.
 - e. The SMS and email he sent to the respondent's managing director did not constitute an act of insubordination.
 - f. No aspect of his performance was discussed in the purported disciplinary hearing, whose minutes were neither signed by any person present nor circulated.
 - g. There was no formal communication from the respondent regarding the extension of his probation. He proceeded to perform his duties with the expectation that he would be confirmed at the end of his probation, having met his objectives as outlined in his employment contract.
6. The parties filed their respective written submissions.
 7. The 1st issue is whether the petition is trapped by the doctrine of constitutional avoidance. It was submitted for the respondent that as was held in *The Owners of Motor Vessel "Lillian S" –Versus- Caltex Oil Kenya Ltd (1989) KLR1*, thus, "Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and 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." It was submitted that in *Mumo Matemu –Versus- Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR* the Court held thus "We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, the process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims." It was further submitted for the respondent that the petitioner had failed to draft the petition with precision to show the violated constitutional rights and the respondent was thereby prejudiced.
 8. It was further submitted for the respondent that the jurisdiction by way of constitutional petition could only be invoked if the determination of the employment dispute in issue could not be determined by way of an ordinary cause. Since the petition did not disclose a prima facie constitutional issue for determination, the proper forum for redress was to be by way of an ordinary action. The respondent cited *Gabriel Mutava & 2 others –Versus- Managing Director Kenya Ports Authority & Another [2016]* where the court held that where a fundamental right is regulated by legislation, such legislation and not the underlying constitutional right, becomes the primary means for giving effect to the constitutional rights. The respondent also cited *Speaker of the National Assembly –Versus- James Njenga Karume (1992) e KLR* where the Court of Appeal held that there was considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed.
 9. It was submitted that in the instant petition the petitioner made a claim for unfair and unlawful termination flowing from the employment relationship and nothing more. The court was urged to uphold the principle of constitutional avoidance which holds that where it is possible to decide a matter without reaching a constitutional issue then that should be done. The Court should therefore find that it is not properly moved.



10. For the petitioner it was submitted that the petitioner had invoked Articles 10, 19(2), 20(1) (2) (3) & (4), 21(1), 23(3), 41, 47(1) and (2); 50(1); 258(1) and 259(1) of the Constitution. It was urged that in that sense, the Court had been properly moved.
11. The Court has considered the revival submissions. The question is about the primary dispute and whether it can be fairly determined by way of the instant petition. At paragraph 30 of the petition the it is pleaded that the grievance is about violation of Articles 10, 25, 41, 47(1) & (2) and Article 50(1) of the Constitution and sections 41, 43, and 45 of the Employment Act, 2007. At paragraphs 40 to 43 the petition states that the petitioner had a legitimate expectation to be confirmed; to be notified and to get opportunity to defend himself of any disciplinary process; his complaints would be considered; and an adverse decision had been made against him without being heard and unilaterally so. The Court has considered the pleadings and the prayers and finds that the case was primarily about unfair termination and the remedies as envisaged in section 49 of the Employment Act, 2007. The Court has also considered the pleadings and the facts that needed to be established such as whether the petitioner was a diligent employee; whether a fair hearing was granted; whether the petitioner was informed about his unsatisfactory performance; whether the petitioner was subjected to a performance review process; whether the petitioner was given an opportunity to defend himself; whether a hearing was conducted per the respondent's disciplinary manual; whether the respondent addressed the issues stated in the response to the letter to show cause; and, whether the petitioner's complaints against the human resource manager had been addressed. It appears to the Court that the respondent is justified to urge that such factual issues arising from the terms and conditions of service and the parties' contractual relationship and which are likely, and in fact, are highly contested, would best be traversed by way of a statement of claim and a statement of response thereto and thereafter, a hearing as it takes place in an ordinary action. For a proper exercise of the Court's jurisdiction and in view of the contested factual matters, the Court finds that the petitioner ought to have moved the Court by way of an ordinary action especially that the primary cause of action was unfair termination per sections 41 , 43 and 45 of the Employment Act, 2007 and the main remedies being as provided in section 49 of the Act. Thus, rule 9(3) of the Employment and Labour Relations Court (Procedure) Rules provides that while a party may file a constitutional petition for enforcement of the Bill of Rights and constitutional provisions, a person may seek the enforcement of any constitutional right and freedom or any constitutional provision in a statement of claim or other suit filed before the Court. It therefore appears to the Court that where the primary claims are statutory and amenable to an ordinary statement of claim like in the instant case, the secondary constitutional claims should be urged in the statement of claim and not a constitutional petition. That is more so, like in the instant case, where the facts in the dispute are best resolved in a full hearing in an ordinary action in which the nature of pleadings permit both parties to traverse the allegations and the contested facts are decided one way or the other by taking the parties respective testimonies. In view of the contested facts, the court considers the petition based solely on affidavit evidence not to be the suited process for effective justice to both parties because many factual findings may not be decided one way or the other.
12. In view of the findings the Court returns that the petition is liable to striking out as trapped by the constitutional avoidance principle. It should be possible for the petitioner to institute a proper claim through a statement of claim. In view of the otherwise live dispute flowing from the employment relationship, there will be no orders on costs.

In conclusion, the petition is hereby struck out with no orders on costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 10TH JULY, 2025.



BYRAM ONGAYA
PRINCIPAL JUDGE

